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No. _____

In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA; Minnesota Department of Natural Resources; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, Minnesota Department of Natural Resources,

Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On July 29, 1837, the United States and thirteen bands of Chippewa Indians executed the Treaty with the Chippewa of 1837, 7 Stat. 536. Article 5 of the 1837 Treaty guarantees the bands the privilege of hunting and fishing on the lands ceded by them to the United States "during the pleasure of the President of the United States." Beginning in 1990, Respondent Bands brought suit against the State of Minnesota alleging that their rights to hunt and fish pursuant to Article 5 continue to exist. The questions presented are:

1. Whether a treaty provision that gives Indian bands the right to hunt and fish "during the pleasure of the President" creates only temporary rights which are extinguished when a state is admitted to the Union on equal footing with the original thirteen states.

2. Whether a treaty ceding to the United States "all right, title and interest of whatsoever nature" in previously ceded territory, constitutes express abrogation of hunting and fishing rights reserved in a previous treaty under this Court's holding in *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985).

3. Whether the President acted within the scope of his congressional authority when he revoked the Indians' rights to hunt and fish under a treaty that only guaranteed those rights "during the pleasure of the President of the United States."

PARTIES TO THE PROCEEDINGS

Petitioners, defendants-appellants below, are the State of Minnesota, its Governor, Arne Carlson, and several officials of the Minnesota Department of Natural Resources. Other defendants-appellants below are the following nine Minnesota counties and eight private landowners who were allowed to intervene at various stages of the litigation: County of Aitkin; County of Benton; County of Sherburne; County of Crow Wing; County of Isanti; County of Kanabec; County of Mille Lacs; County of Morrison; County of Pine; John W. Thompson; Jenny Thompson; Joseph Karpen; Leroy Burling; Glenn Thompson; Gary Kiedrowski; Robert J. Edmonds; and Michael Sheff.

Respondents, plaintiffs-respondents below, are the following eight Chippewa Bands located in Minnesota and Wisconsin, and the United States Government: The Mille Lacs Band of Chippewa Indians; Arthur Gahbow; Walter Sutton; Carleen Benjamin; Joseph Dunkley; United States of America; St. Croix Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewas; Bad River Band of Lake Superior Chippewa Indians; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Sokaogan Chippewa Community; Red Cliff Band of Lake Superior Chippewa; Fond du Lac Band of Chippewa Indians; Robert Peacock; Peter Defoe; Clifton Rabideaux; Herman Wise; and George Dupuis.

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PETITION FOR A WRIT OF CERTIORARI

The State of Minnesota, its Governor, Arne Carlson, and officials from the Minnesota Department of Natural Resources (collectively the "State"), respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The Eighth Circuit opinion is reported at 124 F.3d 904 and reprinted in the appendix hereto ("App.") at 1. That opinion affirmed the following orders and rulings of the District Court, which also are reprinted in the appendix: *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118 (D. Minn. 1994) (*Mille Lacs I*) (App. 351); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784 (D. Minn. 1994) (*Mille Lacs II*) (App. 212); *Mille Lacs Band of Chippewa Indians v. Minnesota*, unreported, No. 3-94-1226 (D. Minn. Mar. 29, 1996) (*Mille Lacs III*) (App. 164); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F. Supp. 1362 (D. Minn. 1997) (*Mille Lacs IV*) (App. 74); *Fond du Lac Band of Chippewa Indians v. Carlson*, unreported, No. 5-92-159 (D. Minn. Mar. 18, 1996) (App. 419).

JURISDICTION

The court of appeals entered its judgment on August 26, 1997. App. 1. A timely petition for rehearing with

suggestion for rehearing en banc was denied on November 17, 1997. App. 482. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. I, Sec. 8, Cl. 3 (App. 483); U.S. Const., Art. VI, Cl. 2 (App. 483); U.S. Const., Amend. X (App. 483); Treaty with the Chippewa, July 29, 1837, article 5, 7 Stat. 536 (App. 484); Treaty with the Chippewas, February 22, 1855, article I, 10 Stat. 1165 (App. 502); Act of February 26, 1857, 11 Stat. 166 (App. 517); Act of May 11, 1858, 11 Stat. 285 (App. 515); Executive Order, President Zachary Taylor, February 6, 1850 (App. 565).

STATEMENT OF THE CASE

This case involves a dispute between the State of Minnesota and eight Chippewa Bands (collectively the "Bands") located in Minnesota and Wisconsin over the State's authority to regulate the harvest of fish and game in a uniform, nondiscriminatory manner for all citizens. The dispute arises from the Bands' assertion that the hunting and fishing rights the Bands reserved under Article 5 of the Treaty of 1837 continue to exist, that, as a result, the State's authority to regulate those activities against Band members is severely limited, and that the State is obligated to modify its regulations of non-Indians to accommodate a defined "treaty harvest."

A. Historical Introduction:

On July 29, 1837, the United States and thirteen bands of Chippewa Indians executed the Treaty with the Chippewa of 1837 (hereinafter "the 1837 Treaty"), 7 Stat. 536, which contained the following key provision:

> Article 5. The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States. . . .

App. 486. The primary goal of the federal government was to extinguish the Indian title to the lands ceded to the United States, so that the lands could be opened up to lumbering the pine forests, while additionally allowing white settlement at such time as the government might deem that desirable. App. 228-229, 231. The official Journal of the 1837 Treaty Negotiations describes how Chippewa spokesmen requested that the government only use the Chippewa lands for a period of years, and that the Indians retain the lands that the government was requesting on a permanent basis for hunting, fishing and other purposes. App. 231-233. In response to the Indians' requests, negotiator Governor Dodge explained that the government was not interested in "leasing" the land, and twice said the hunting and fishing privileges the Indians were reserving were temporary in nature. App. 233.

By the late 1840's, white settlement and expansion were beginning to increase, and the federal government was under considerable pressure to complete the removal of the Indians to lands west of the Mississippi. App. 241-253. On February 6, 1850, President Zachary Taylor

responded to calls for removal and for a resolution to Indian-white conflict by issuing an Executive Order to accomplish two distinct objectives: (1) to terminate any special hunting, fishing, and gathering privileges that had been reserved for the Chippewa in the 1837 and 1842 treaties; and (2) to order the removal of the Chippewas from the 1837 and 1842 ceded territories. App. 252. The Executive Order provides that the privileges of hunting and fishing granted temporarily to the Chippewa Indians by Article 5 of the Treaty of 1837 are hereby revoked. App. 565.

The Chippewa opposed removal to such an extent that by June of 1851, the new Commissioner of Indian Affairs concluded that removal was not in the interests of the United States, and recommended that the Executive Order be modified to allow those Chippewa that so desired to remain in the Ceded Territory. App. 259. While active removal efforts were effectively ended, no subsequent order was ever issued officially revoking the 1850 Executive Order. App. 321.

By 1854, the advocates for a new reservation policy began to prevail. In early 1855, the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa, including the Mille Lacs Band, entered into new treaty negotiations with the U.S. government. App. 276-277. The terms of the 1855 Treaty, 10 Stat. 1165, were that in exchange for complete relinquishment of rights by the signatory bands, the Indians would be secured permanent reservations in the Minnesota Territory. App. 282-283.

The central article of the 1855 Treaty for purposes of this case was Article 1. The Chippewa agreed to cede,

sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota. App. 502. The Chippewa further agreed to fully and entirely relinquish and convey to the United States, "any and all right, title, and interest, of whatsoever nature the same Indians may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." App. 503. As the December 19, 1854 Congressional Act directed, the Treaty language sought to extend the laws of the United States and the Minnesota Territory over all the Chippewa territory in Minnesota, and the land ceased to be Indian country. App. 328. Unlike the 1837, 1842, and 1854 treaties, the 1855 Treaty did not reserve to the Chippewa any hunting, fishing, and gathering rights on ceded lands. App. 284.

In May 1858, Minnesota was admitted to the Union as a State on an equal footing with the original states. App. 515. At the first session of the new state legislature, Minnesota passed two laws regulating hunting, and, reflecting their understanding of the earlier treaties, the legislature expressly extended the reach of those bills to Indians off their reservations. App. 298, 569-575. Since that time, Minnesota has always applied its game and fish laws to off-reservation Indians the same as it has applied them to anyone else.

Almost a century later, beginning in 1940, the Minnesota and Wisconsin Chippewa Bands brought various claims against the federal government for, among other things, alleged fraud and misrepresentation in the negotiation of the treaties. App. 39. The Chippewa Bands sought compensation from the United States for the range

of rights and interests that were ceded and foregone by them in the exchange. App. 39-41, 45-46. The Chippewa were ultimately awarded over nine million dollars to resolve all claims under the 1837 Treaty. App. 47. Despite this final claims resolution, the Respondent Bands brought claims against the State under the Treaty of 1837 beginning in 1990. App. 9-10.

B. The Present Conflict:

In 1990, the Mille Lacs Band of Chippewa Indians sued the State of Minnesota challenging its authority to enforce its hunting and fishing laws against Band members in a large portion of east-central Minnesota. App. 9-10. The lawsuit was based on the 1837 Treaty. *Id.* The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343(a), and 1362. App. 215-216. Nine counties and six private landowners were allowed to intervene as defendants in April 1993, and the United States was allowed to intervene as a plaintiff in December 1993. App. 10.

The district court bifurcated the *Mille Lacs* case into two phases. App. 11. Following a Phase I trial, the court ruled that the Mille Lacs Band had a continuing right to hunt, fish and gather pursuant to Article 5 of the 1837 Treaty. App. 12. It also ruled that the Band's harvesting activities are applicable only on public lands or those private lands that are open to the public for hunting. *Id.*

In ruling for the Band, the court rejected all of the State's defenses. First, the court held that President Zachary Taylor's 1850 Executive Order (App. 565), which expressly revoked the Band's rights under the 1837

Treaty, was invalid because the President did not have authority to issue it. App. 21-22. Moreover, even if the President had the authority to revoke the Bands' rights, the Executive Order was still invalid because it was inconsistent with the Indian's understanding of when their rights could be revoked. App. 22.

The district court also rejected the State's contention that the Treaty of 1855 extinguished the Mille Lacs Band's rights in the 1837 Ceded Territory. App. 35-36. The court ruled that there was no explicit termination of the Band's 1837 Treaty rights within the language of the 1855 Treaty, and that the historical context surrounding the 1855 Treaty, and the Band's understanding of what it entailed, necessarily dictated that the rights were not extinguished. *Id.*

On March 29, 1996, the court ruled that six Wisconsin Chippewa Bands, who had successfully intervened several months earlier, also had rights under the 1837 Treaty to hunt and fish in the Minnesota portion of the 1837 Ceded Territory. App. 13. The decision was largely predicated on the earlier decision of the district court in *Mille Lacs II*, however, the court did address the State's new contention that the Bands' rights were extinguished when the State of Minnesota was admitted into the Union on equal footing with the original thirteen states.[1] It ruled that the Bands' 1837 Treaty rights were continuing in nature, not temporary, and therefore the equal footing doctrine as articulated in *Ward v. Race Horse*, 163 U.S. 504

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[1] This defense had not been raised with respect to the Mille Lacs Band. App. 52.

(1896), did not apply so as to extinguish the rights upon the State's admission into the Union. App. 187-189.

At the same time that the *Mille Lacs* case was proceeding, the State was also involved in a separate lawsuit involving the 1837 Treaty with the Fond du Lac Band of Chippewa Indians. App. 14. On March 18, 1996, the district court ruled that the Fond du Lac Band retains hunting, fishing and gathering rights under the 1837 Treaty as well; the decision was largely predicated on the 1994 ruling issued by the district court in the *Mille Lacs II* case. *Id.*

In June 1996, the district court ruled that the Phase II portions of the *Mille Lacs* and *Fond du Lac* cases should be consolidated. App. 14-15. Phase II addressed resource allocation issues and the validity of particular measures to regulate the exercise of such rights. App. 15. On January 29, 1997, the district court issued a Memorandum Opinion and Order that resolved all pending motions in Phase II of the consolidated cases. The January 29 Order directed the entry of final judgment in the *Mille Lacs* case and further directed entry of judgment with respect to the 1837 Treaty claim in the *Fond du Lac* case. *Id.* The court ordered that, upon the Bands' adoption of their "Model Conservation Code," State officials were permanently enjoined from any action that would prevent or interfere with the exercise of the Bands' rights to hunt, fish and gather under the 1837 Treaty except as authorized in the opinions and orders of the court. *Id.*

The Eighth Circuit, in a unanimous panel decision, affirmed the decisions of the district court on all grounds.

App. 1. The State sought rehearing and suggested rehearing en banc, but the court of appeals denied both motions in a one page order dated November 17, 1997.[2] App. 482.

REASONS FOR GRANTING THE PETITION

This case presents several important issues critical to the ongoing definition of the respective roles of the federal, state, and tribal governments in setting public policy, particularly in the area of natural resources management. Managing game and fish has long been recognized as a core sovereign function of the states, subject only to limited federal involvement and to a limited recognition of tribal authority over Indian band members in Indian country. Consistent with that allocation of responsibility, Minnesota has managed its natural resources in a nondiscriminatory manner for all of its citizens since it was admitted to the Union in 1858.

The decisions below radically restructure that relationship. If those decisions stand, Minnesota's policymaking discretion over the natural resources in its east-central region will be sharply curtailed. Instead, Minnesota's natural resource managers will now operate under perpetual federal court supervision, to determine on an ongoing basis whether Minnesota's rules and policies need to be altered to accommodate a tribal "treaty harvest," subject to different tribal rules and policies.

[2] Two judges voted to hear the case en banc. App. 482.

While Minnesota certainly acknowledges that this Court has found Indian treaty hunting and fishing rights to preempt contrary state law in other circumstances, Minnesota submits that allowing such a decision to stand in this case does considerable violence to important core principles:

> – the recognition of state sovereignty over natural resources within its territory inherent in each state's admission to the Union on an "equal footing," and the presumption against federal preemption;
>
> – this Court's recognition that the "plain language" in Indian treaties must be respected, even if it means a denial of Indian claims; and
>
> – the deference owed to Presidential orders issued under broad grants of Congressional authority.

On each of these points, the decision below either conflicts with the decision of other circuits, or flatly contradicts this Court's own rulings.

I. THERE IS A SPLIT IN CIRCUIT COURT AUTHORITY ON WHETHER TREATY-BASED RIGHTS WHICH ARE TEMPORARY IN NATURE ARE EXTINGUISHED WHEN A STATE ENTERS THE UNION ON "EQUAL FOOTING" WITH THE ORIGINAL THIRTEEN STATES.

In the decision below, the Eighth Circuit held that the Bands' hunting and fishing rights under the 1837 Treaty were not subject to this Court's holding in *Ward v. Race Horse*, 163 U.S. 504 (1896). App. 52. The Eighth Circuit's decision is in direct conflict with the ruling of the Tenth

Circuit in *Crow Tribe of Indians v. Repsis*, that treaty-based hunting rights which are temporary or contingent are extinguished when a state is admitted into the Union on "equal footing" with the other states. 73 F.3d 982, 991 (10th Cir. 1995), *cert. denied*, 116 U.S. 1851 (1996). The conflict between the circuits should be resolved by this Court.

The equal footing doctrine requires that all states admitted into the Union after the original thirteen states have the same rights and sovereignty at the time of admission as the original states. *See Repsis*, 73 F.3d at 990-91. Included in that bundle of rights are the states' sovereign trust and police powers over the taking of game and fish within their borders; the "power to preserve and regulate the exploitation of an important resource." *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371, 386 (1978). The framework for evaluating whether a treaty-based right is permanent, and survives a state's admission into the Union, or temporary, and does not survive, is well established:

> [W]here there are rights created by congress, during the existence of a territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of congress to continue them in the state, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since by its terms, it shows that the burden imposed on the territory was essentially

perishable, and intended to be of a limited duration.

Ward v. Race Horse, 163 U.S. at 515.

The Eighth Circuit's decision deviated from the framework established in *Ward* and *Repsis* by asserting that the equal footing doctrine only applies to rights which are tied to ownership of the land. App. 55. It then went on to conclude that because the Bands' hunting and fishing rights had been severed from the land, the principle did not apply to this case. *Id.* While it is true that the treaty-based hunting rights in *Ward* and *Repsis* had not been severed from the land, that fact was irrelevant to the courts' equal footing analysis. Neither the Tenth Circuit in *Repsis* nor this Court in *Ward* analyzed the nature of these rights based on their relationship to ownership of the land. Rather, the central issue was whether the rights were intended to survive in perpetuity against the United States and the states. The Court in *Ward* elaborated on the nature of the right, stating, "[i]ndeed, the whole argument of the [Indians] rests on the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious." 163 U.S. at 515.

Likewise, the holding of *Repsis* is that the determination of whether a treaty-based right is permanent or temporary depends on whether the right was intended, *at the time of the treaty*, to survive forever against the United States and the states. 73 F.3d at 991. The equal footing doctrine does not prevent the United States from creating a treaty right which would be binding upon the state after its admission into the Union. However, in order to

do so, "it must be a continuing or perpetual right – a right that is intended at its formation to be continuing against the United States, and its grantees, including the state." *Id*, citing *United States v. Winans*, 198 U.S. 371, 381-82 (1905).[3] The Eighth Circuit failed to apply this standard to this case.

The Eighth Circuit's decision goes on to suggest that the fact that the Bands' 1837 hunting and fishing rights could be revoked by the President, or abrogated by Congress like any other treaty right, did not deprive them of their continuing nature. App. 55-56. However, this statement cannot be reconciled with the holding in *Repsis* that a continuing right is one that at the time of its formation was intended to be continuing. 73 F.3d at 991. The 1837 Treaty reserves the Bands' rights to hunt, fish and gather "at the pleasure of the President of the United States." The temporary or contingent nature of the rights is captured by the phrase "at the pleasure of the President," which provides, by its very terms, for the potential extinguishment or revocation of the rights. None of the parties to this case have ever claimed that Article 5 conferred permanent, unalienable rights (with the exception of Congress' plenary authority over the Indians) on the Bands. Such an interpretation would completely read out

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[3] Many treaties never contemplated the extinguishment of tribal hunting rights. *See Winans*, 198 U.S. at 381-83 (Indians given right "in common with citizens of the Territory;" their right was a continuing one); *Holcomb v. Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013, 1014 n.1 (9th Cir. 1967). The language in these treaties that created permanent rights, however, is fundamentally different than the phrase "at the pleasure of the President" in Article 5 of the 1837 Treaty.

of the treaty the phrase "at the pleasure of the President of the United States." Moreover, in 1850, eight years before the territory of Minnesota became a state, President Zachary Taylor issued an executive order which expressly revoked the Bands' rights to hunt and fish under the 1837 Treaty.[4] App. 5. President Taylor's Executive Order further illustrates the temporary, precarious nature of the Bands' rights.

The Seventh Circuit in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983), also recognized the contingent nature of the rights guaranteed by Article 5 of the 1837 Treaty. The Seventh Circuit came to the conclusion that the rights secured under Article 5 were contingent on the Indians' behavior. If they misbehaved, the rights were revocable. *Lac Courte Oreilles*, 700 F.2d at 357. The district court in this case agreed with the Seventh Circuit that the rights were revocable. It held that, "[c]ontrary to the assertions of defendants, the 1837 treaty did not give the President unfettered discretion to revoke the guaranteed usufructuary rights. That discretion was restricted so long as the Indians behaved well and peacefully. . . . " App. 314. The district court's conclusion in this case that Article 5 expressly contemplates a future event, namely misbehavior by the Indians, which would allow the President to revoke the Indians rights to hunt and fish, is consistent

[4] The Executive Order and its effect on the Bands' 1837 Treaty rights in this case are addressed below in Section III of this Petition.

with rights being temporary or contingent for purposes of the equal footing doctrine.[5]

The conclusion reached by the district court in this case and by the Seventh Circuit in *Lac Courte Oreilles* regarding the nature of the rights (i.e., revocable upon Indian misbehavior) is strikingly similar to the conclusions reached by the courts in *Ward* and *Repsis*, which found that the relevant language in those treaties was also temporary and contingent. Like the hunting right at issue in *Repsis* and *Ward*, the Bands' rights under the 1837 Treaty were also temporary and precarious. The temporary nature of the rights brings this case squarely in conflict with the decision of the Tenth Circuit in *Repsis*, and that conflict needs to be resolved by the Court.

II. THE EIGHTH CIRCUIT'S CONSTRUCTION OF THE 1855 TREATY CANNOT BE RECONCILED WITH THIS COURT'S DECISION IN *KLAMATH*.

The Eighth Circuit ruled that Indian band conveyances to the United States by treaty of "any and all right,

[5] While the district court ruled that the rights were continuing, it did so only after it had first determined that the rights had not been terminated by the 1850 Order and the 1855 Treaty. Nowhere did the district court hold that the rights were permanent by their very nature or by the express terms of the Treaty, which is the relevant question for purposes of equal footing analysis. The determination of whether the rights are "temporary and precarious" must be made on the basis of the Treaty, at the time of the Treaty, not on the basis of subsequent events or congressional actions. In this case, the Eighth Circuit did not address the "misbehavior" standard aspect of the district court's opinion. App. 31.

title and interest in land" do not, in the absence of express preservation of rights language, extinguish hunting and fishing rights in areas ceded by the Indians. App. 36-38. The court's ruling cannot be reconciled with this Court's decision in *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985), where it examined a treaty provision virtually identical to that used in the 1855 Treaty at issue here. This Court in *Klamath* held that language ceding "all claim, right, title, and interest in and to" land also ceded any special hunting and fishing rights reserved on those lands, even without any explicit reference to those rights in the treaty document. *Klamath*, 473 U.S. at 765-766. In other words, the "all right, title and interest" language is express extinguishment of previously reserved hunting and fishing rights.

The Eighth Circuit distinguished *Klamath* almost entirely on the assertion that the rights in *Klamath* were exclusive and on-reservation rights, whereas the rights at issue in this case were non-exclusive and off-reservation rights. App. 39. Contrary to the Eighth Circuit's contention, this Court in *Klamath* directly addressed the impact of the "all right, title and interest" language to off-reservation hunting and fishing rights. This Court explained that because the land ceded by the Klamath Tribe was no longer part of the reservation, the off-reservation rights claimed by the Tribe were somewhat comparable to the off-reservation right reserved in the Treaty construed in *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968), and *United States v. Winans*, 198 U.S. 371 (1905)." *Klamath*, 473 U.S. at 764-65 n.16. This Court then added, "[o]ur inquiry, therefore, is whether a special right, nonexclusive but free of state regulation, was

intended to survive in the face of language of the 1901 Agreement ceding 'all . . . right . . . in and to' the ceded lands." *Id.* at 464-65. The Court concluded that no such special right survived such language. *Id.* at 466-69; *see also Menominee Indian Tribe of Wisconsin v. Thompson*, 943 F. Supp. 999, 1018 (W.D. Wis. 1996) (*Klamath* holds that when the Indians cede "all their right, title and claim" to certain land, they gave up any off-reservation hunting and fishing rights as well). The Court later reiterated that its decision applied to off-reservation rights: "The present case, however, involves the necessarily precedent question whether any off-reservation rights were intended to be preserved at all. *Winans* sheds no light on how that question should be resolved." *Klamath*, 473 U.S. at 769 n. 20.[6] The *Klamath* decision is controlling precedent on the effect of the "all right, title, and interest to" language on previously reserved off-reservation hunting and fishing rights, but was not even applied to this case by the Eighth Circuit.

The Eighth Circuit's decision also erroneously adopts the Bands' distinguishment argument that the hunting and fishing rights in *Klamath* were held to be appurtenant

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[6] In *Klamath*, the land ceded under the 1901 Agreement was no longer reservation land. Therefore, any exercise of hunting and fishing rights on that land in the modern era would have changed from exclusive, on-reservation harvest, to shared, off-reservation harvest. The Court started its analysis with the cession language in the 1864 Treaty, where the Tribe ceded "all their right, title, and claim" to a described 22 million acre area. As the Court put it, "that general conveyance unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed in over 20 million acres outside the reservation." *Id.* at 766.

to the land, in contrast to the 1837 Treaty privileges which have always been held independently of any interest in the land, and therefore the 1837 Treaty rights had to be expressly extinguished. App. 37. This Court in *Klamath* acknowledged that some Indian treaties – notably the ones involved in the Washington fishing cases – reserved for the Indians special hunting and fishing rights "at all usual and accustomed places," instead of within described geographic areas. In those cases, the Court agreed that hunting and fishing rights could be independent of land ownership. *Klamath*, 473 U.S. at 765-66. But in cases like this one, where the reservation of hunting and fishing rights is limited to defined geographical areas, cession of "all right, title, and claim" to the defined area carries the hunting and fishing rights with it, unless they are expressly reserved. *Id.* at 766; *see also Menominee*, 943 F. Supp. at 1018-19. Therefore, under *Klamath*, the Bands' 1837 Treaty rights were appurtenant to the land, and the 1855 Treaty language relinquishing "any and all right, title, and interest, of whatsoever nature the same may be" to those lands, relinquished the 1837 Treaty hunting and fishing rights as well. This critical component of the *Klamath* decision was not addressed or even acknowledged by the Eighth Circuit.

The scope of this Court's holding in *Klamath* on the land ownership issue becomes even clearer when one looks at the Ninth Circuit's opinion in *Klamath* under review. 729 F.2d 609 (9th Cir. 1984). Relying on the Seventh Circuit's decision in *Lac Courte Oreilles*, the Ninth Circuit accepted as a given that special treaty hunting and fishing rights continue to exist apart from ownership, possession, or interest in the land, and could not be taken

away absent explicit reference. *Id.*, 729 F.2d at 612. This Court in *Klamath* rejected that conclusion. Instead, the Court held that a cession of land interests does extinguish special treaty hunting and fishing rights that were tied to that land, even if there is no express mention of those rights in the cession agreement.

The Eighth Circuit's ruling runs counter to the established principle that "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation*, 318 U.S. at 432. In this case, the district court's elaborate recital of evidence introduced by the Band to buttress its claims that it never understood the 1855 Treaty to extinguish 1837 Treaty usufructuary rights, erroneously expands the terms of Article 1 in the 1855 Treaty beyond that which the canons of construction will tolerate.

Finally, the specific language of the 1855 Treaty has already been examined by this Court and found to be binding based on its plain meaning. When the United States brought suit in *United States v. Minnesota*, challenging certain land patents from former Chippewa land cessions, the Court undertook an analysis of the factual background of the 1855 Treaty negotiations. 270 U.S. 181 (1926). It concluded:

> while the earnestness of counsel has induced us to examine the basis of the argument advanced, there is another reason why the effort to overcome the [1855 Treaty] cession must fail. Under the Constitution, the treaty-making power resides in the President and Senate, and when

> through their action a treaty is made and proclaimed it becomes a law of the United States, and the courts can no more go behind it for the purpose of annulling it in whole or in part than they can go behind an act of Congress.

270 U.S. at 201. Therefore, because the cession language in the 1855 Treaty is unequivocal, this Court should find as a matter of law that it extinguished all incidents of the Band's rights of use, occupancy, and title to the ceded lands, including any rights to hunt, fish, and gather free from state regulations. That is the only holding that will give effect to the clear wording and "plain meaning" of the 1855 Treaty, and this Court needs to address that issue to preserve the integrity of *Klamath*.

III. THE DECISION OF THE COURT OF APPEALS TO REFUSE TO ENFORCE PRESIDENT TAYLOR'S EXECUTIVE ORDER CANNOT BE RECONCILED WITH THIS COURT'S PREVIOUS DECISIONS UPHOLDING THE EXERCISE OF PRESIDENTIAL AUTHORITY.

One of the key issues in this case is the effect of President Zachary Taylor's 1850 Executive Order on the Bands' hunting and fishing rights under Article 5 of the 1837 Treaty. The Executive Order states:

> *The privileges granted temporarily to the Chippewa Indians of the Mississippi*, by the Fifth Article of the Treaty made with them on the 29th of July 1837, "of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" by that treaty to the United States, . . . *are hereby revoked;* and all of the said Indians remaining on the

> lands ceded as aforesaid, are required to remove to the unceded lands.

App. 565 (emphasis added). Notwithstanding the clear, unambiguous and complete revocation of the Bands' 1837 Treaty rights by the Executive Order, the Eighth Circuit ruled that the Executive Order was ineffective in revoking the rights because the President did not have authority to issue it in 1850. App. 21-22. The Eighth Circuit's decision is in direct conflict with the ruling of this Court in *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring), that Presidential orders have the full force and effect of law so long as the President acts pursuant to the Constitution or express or implied authorization from Congress.

The Eighth Circuit ruled that President Zachary Taylor's 1850 Executive Order had, on its face, two seemingly separate provisions – the first revoking the Bands' hunting and fishing rights under the 1837 Treaty, and the second removing the Bands from the 1837 Ceded Territory. App. 28. The court of appeals ruled that the President did not have authority for the second provision, to remove the Bands, and that he would not have issued the revocation portion of the Order on its own. App. 29. Consequently, because the revocation portion of the Order could not be severed from the unconstitutional part (that dealing with removal), the entire Order was without authority. *Id.*

In this case, Congress provided the President with express statutory authority to terminate the Chippewa's hunting and fishing rights at his pleasure, when it ratified

the 1837 Treaty. That authority is found in the plain language of Article 5, which guarantees the Bands' rights only "during the pleasure of the President." Nowhere in the Treaty or in any other congressional act or authorization is the President required to seek the approval of Congress or the Bands before taking particular action. Nowhere in the Treaty is the President required to make findings as to why he is exercising his authority under Article 5. And, finally, Congress has not repealed, abrogated or modified the President's authority under Article 5 in any subsequent treaty or congressional act.

In *Youngstown*, this Court stated that when the President acts pursuant to an express or implied authorization of Congress, his "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 U.S. at 635-36. The Court went on to state that executive action pursuant to an act of Congress would be "supported by the strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Id.* at 637. Consistent with that standard of deference, the courts below should have given effect to the express language in the 1850 Order and held that the temporary hunting and fishing rights reserved in the 1837 Treaty were indeed revoked. The result of the Eighth Circuit's decision is, however, that the phrase "during the pleasure of the President" is essentially read out of the Treaty, and that Article 5 should instead be interpreted as guaranteeing them the "privilege of hunting, fishing," forever.

There is no authority for courts to change the terms of a treaty, which is precisely what the Eighth Circuit has

done in this case. Under the U.S. Constitution, the treaty-making power resides in the President and the Senate, and when through their action a treaty is made and proclaimed it becomes the law of the United States, and the courts can no more go behind it for the purpose of annulling it, in whole or in part, than they can go behind an act of Congress. *United States v. Minnesota*, 270 U.S. 181, 201 (1926). However, this is precisely what the lower courts did in this case when they ignored the plain language of the relevant documents, and ignored the strong presumption in modern case law against federal preemption of the exercise of the states' traditional police powers.

The Eighth Circuit held that even if the revocation portion of the Order was authorized, it cannot be severed from the removal portion of the Order, which was not authorized, and therefore the entire Executive Order was without authority. App. 29. The test for determining whether to sever an unconstitutional part of an executive order from a constitutional part was established in *Champlin Rfg. Co. v. Commission*, where the Court stated, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as of law." 286 U.S. 210, 234 (1932). The Eighth Circuit appropriately cites to the test for severing an executive order, but then never applies the test to the facts surrounding the 1850 Executive Order.

The President's intent in issuing the 1850 Order should be determined, in the first instance, based on the

language of the Order and its origin in the joint resolution of the Territorial Legislative Assembly, which requested it. Both the 1850 Executive Order and the joint resolution speak to accomplishing two objectives: 1) revoke the Bands' hunting and fishing rights under the 1837 Treaty, and 2) remove the Bands from the Ceded Territory. There is nothing from the language of the Executive Order which evinces that the President would not have issued the revocation portion of the Executive Order if he had known that there was no authority for the removal portion of it.

In addition, the revocation portion of the 1850 Executive Order operates independently of the removal portion of the Order. As argued to the Eighth Circuit and the lower courts, the revocation portion of the Order was designed to end the use of the Ceded Territory by all Bands. The removal portion was designed to end the occupancy of those Bands which lived in Ceded Territory. The Executive Order is simply silent on this issue. The Eighth Circuit addresses none of these issues, but incredibly concludes that the President would not have issued the revocation portion of the Executive Order on its own. Given the joint resolution, the specific language of the Executive Order, and the different goals of the two provisions of the Executive Order, it is hardly evident under *Champlin* that the President would not have issued the Executive Order. This Court needs to review that decision to reaffirm its previous rulings regarding Presidential authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States of America; St. Croix Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewas; Bad River Band of Lake Superior Chippewa Indians; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Sokaogan Chippewa Community; Red Cliff Band of Lake Superior Chippewa, Intervenors-Plaintiffs-Appellees,

v.

STATE OF MINNESOTA; Minnesota Department of Natural Resources; Rodney Sando, Commissioner of Natural Resources, Defendants, County of Aitkin; County of Benton; County of Sherburne; County of Crow Wing; County of Isanti; County of Kanabec; County of Mille Lacs; County of Morrison; County of Pine, Intervenors-Defendants-Appellants.

FOND DU LAC BAND OF CHIPPEWA INDIANS; Robert Peacock; Peter Defoe; Clifton Rabideaux; Herman Wise; George Dupuis, Plaintiffs-Appellees,

v.

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County of Aitkin; County of Benton; County of Sherburne; County of Crow Wing; County of Isanti; County of Kanabec; County of Mille Lacs; County of Morrison; County of Pine, Movants-Appellants.

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John W. Thompson; Jenny Thompson; Joseph Karpen; Leroy Burling; Glenn Thompson; Gary Kiedrowski, Intervenors-Defendants-Appellants.

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v.

John THOMPSON; Jenny Thompson; Glenn Thompson; Joseph Karpen; Leroy Burling; Gary Kiedrowski, Movants-Appellants,

Robert J. Edmonds; Michael Sheff, Movants, Arne Carlson, Governor of Minnesota; Rodney Sando, Commissioner of the Minnesota Department of Natural Resources; Raymond B. Hitchcock, Assistant Commissioner of Operations, Minnesota Department of Natural Resources, Defendants,

County of Aitkin; County of Benton; County of Sherburne; County of Crow Wing; County of Isanti; County of Kanabec; County of Mille Lacs; County of Morrison; County of Pine, Movants.

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v.

STATE OF MINNESOTA; Minnesota Department of Natural Resources; Rodney Sando, Commissioner of Natural Resources, Defendants-Appellants, County of Aitkin; County of Benton; County of Sherburne; County of Crow Wing; County of Isanti; County of Kanabec; County of Mille Lacs; County of Morrison; County of Pine, Intervenors-Defendants.

MILLE LACS BAND OF CHIPPEWA INDIANS; Arthur Gahbow; Walter Sutton; Carleen Benjamin; Joseph Dunkley, Plaintiffs-Appellees,

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v.

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County of Aitkin; County of Benton; County of Sherburne; County of Crow Wing; County of

Isanti; County of Kanabec; County of Mille Lacs; County of Morrison; County of Pine, Intervenors-Defendants-Appellants.

MILLE LACS BAND OF CHIPPEWA INDIANS, Plaintiffs-Appellants,

Arthur Gahbow; Walter Sutton; Carleen Benjamin; Joseph Dunkley, Plaintiffs,

United States of America, Intervenors-Plaintiffs,

St. Croix Chippewa Indians of Wisconsin; Lac du Flambeau Band of Lake Superior Chippewas; Bad River Band of Lake Superior Chippewa Indians; Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin; Sokaogan Chippewa Community; Red Cliff Band of Lake Superior Chippewa, Intervenors-Plaintiffs-Appellants,

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Nos. 97-1757, 97-1764, 97-1768, 97-1770, 97-1771, 97-1772, 97-1774, 97-1937 and 97-1938.

United States Court of Appeals,
Eighth Circuit.

Submitted June 12, 1997.

Decided Aug. 26, 1997.

Rehearing and Suggestion for Rehearing En Banc Denied Nov. 17, 1997.*

James Martin Johnson, Olympia, WA, argued, for appellants County of Pine, Morrison, Mille Lacs, Kanabec, Crow Wing, Sherburne, Benton and Aitkin.

Stephen G. Froehle, Minneapolis, MN, argued, for appellants Gary Kiedrowski, Glenn Thompson, Leroy

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* Judge Wollman and Judge Loken would grant the suggestion. Judge Murphy took no part in the consideration or decision of this case.

Burling, Joseph Karpen, Jenny Thompson, John W. Thompson, Michael Sheff and Robert J. Edmonds.

Peter Lund Tester, St. Paul, MN, argued, for appellants Raymond B. Hitchcock, Rodney Sando, Arne Carlson and Minnesota Department of Natural Resources.

Douglas Endreson, Washington, DC, argued, for appellees George Dupuis, Herman Wise, Clifton Rabideaux, Peter Defoe, Robert Peacock and Fond du Lac Band of Chippewa Indians.

Marc D. Slonim, Seattle, WA, argued, for appellees Joseph Dunkley, Carleen Benjamin, Walter Sutton, Arthur Gahbow and Mille Lacs Band of Chippewa Indians.

Elizabeth Ann Peterson, U.S. Department of Justice, Washington, DC, argued, for intervenors.

Before McMILLIAN, LAY, and JOHN R. GIBSON, Circuit Judges.

LAY, Circuit Judge.

I. BACKGROUND

A. *Introduction*

One hundred sixty years ago, near Fort Snelling, Minnesota, representatives of the United States and representatives of twelve bands of the Chippewa Nation negotiated a treaty which ceded Indian[1] title to certain

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[1] The plaintiff Bands in this case have referred to themselves throughout as Bands of Chippewa Indians, though,

lands in the Upper Midwest. Historical documents demonstrate that the government was interested in purchasing the land for purposes of harvesting its pine timber. *See* 1837 Treaty Journal 131; Letter from Commissioner of Indian Affairs Carey A. Harris to Henry Dodge, Wisconsin Territorial Governor, and General W.R. Smith (May 13, 1837). On July 29, 1837, the Bands signed a treaty ceding over thirteen million acres of land in present-day Wisconsin and Minnesota to the United States in exchange for money, goods, and supplies. Treaty with the Chippewas, July 29, 1837, 7 Stat. 536. Article V of the Treaty provided, "[T]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States." These usufructuary rights form the subject matter of the present litigation.

In 1990, the Mille Lacs Band of Chippewa Indians and some of its individual members (the Mille Lacs Band), later joined by the Fond du Lac Band of Chippewa Indians and some of its individual members[2] (the Fond du Lac Band) and several Wisconsin Bands of Chippewa

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as the district court noted, "Chippewa," "Ojibwa," or "Ojibwe" are all terms "used by experts and others to refer to the same group of Native American people." *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F.Supp. 784, 790 n. 5 (D.Minn.1994). We echo and adopt the district court's conclusion: "Since the words Chippewa and Indians are those which have been used legally [and by the parties], they are adopted in this opinion." *Id.*

[2] The Fond du Lac Band and its members filed suit separately, under both the 1837 Treaty and a separate treaty signed in 1854.

Indians (the Wisconsin Bands)[3] (collectively "the Bands") sought a declaratory judgment in federal district court as to the continued existence of their usufructuary rights in the Minnesota portion of the territory they ceded in the 1837 Treaty. The Bands also sought injunctive relief to enforce these treaty rights to hunt, fish, and gather in the ceded lands free of state regulation.

1. *Mille Lacs I* (*Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F.Supp. 1118 (D.Minn.1994))

In the *Mille Lacs* case, the Mille Lacs Band initially sued the State, the Minnesota Department of Natural Resources, and the Commissioner of Natural Resources (collectively "the State"). Nine Minnesota counties[4] and six Minnesota landowners[5] intervened as defendants, and the United States intervened as a plaintiff. *Mille Lacs I*, 853 F.Supp. at 1123.

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[3] The Wisconsin Bands include the St. Croix Chippewa Indians, Lac du Flambeau Band, Bad River Band of Lake Superior, Lac Courte Oreilles Indians, Sokaogan Chippewa Community, and Red Cliff Band of Lake Superior. The Wisconsin Bands' treaty rights in the Wisconsin portion of the 1837 ceded territory have been adjudicated in litigation in federal courts in Wisconsin. *See Lac Courte Oreilles Band of Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir.1983) (*LCO*); *see also infra* note 19 (explaining the *LCO* litigation).

[4] The counties are Aitkin, Benton, Crow Wing, Isanti, Kanabec, Mille Lacs, Morrison, Pine, and Sherburne; they will be referred to throughout this opinion as "the Counties."

[5] The landowners are John W. Thompson, Jenny Thompson, Joseph N. Karpen, LeRoy Burling, Glenn E. Thompson, and Gary M. Kiedrowski.

The district court bifurcated the *Mille Lacs* case into two phases. Phase I was to decide whether the Mille Lacs Band's rights to hunt, fish, and gather under the 1837 Treaty continue to exist and the general nature of any such rights, including whether they extend to lands now or previously in private ownership. Phase II was to decide resource allocation issues and the validity of particular measures to regulate the exercise of the rights. *Id.*

In *Mille Lacs I*, on cross-motions for summary judgment, the district court[6] held that (1) various delay-based defenses do not bar the Mille Lacs Band's claims, *id.* at 1124-26, 1127-28, 1138-39, (2) the Mille Lacs Band and the Commissioner of Natural Resources are persons within the meaning of 42 U.S.C. § 1983, *id.* at 1126-27, (3) the suit is not barred by the Eleventh Amendment, *id.* at 1128-29, (4) the Commissioner of Natural Resources is not exempt from suit under the doctrine of qualified immunity and other parties urged by the State are not indispensable, *id.* at 1129-31, and (5) the Band's claims are not precluded by res judicata or collateral estoppel, *id.* at 1132-38. The court also rejected the State's motion for summary judgment which argued that an 1850 Executive Order and an 1855 Treaty extinguished the Band's usufructuary rights. *Id.* at 1142-43. Finally, the court dismissed counterclaims the six Minnesota landowners brought against the United States. *Id.* at 1143-46.

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[6] The Honorable Diana E. Murphy, then-Chief United States District Judge for the District of Minnesota.

2. *Mille Lacs II* (*Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F.Supp. 784 (D.Minn.1994))

After a trial held on Phase I issues, the district court ruled that the Mille Lacs Band had a continuing right to hunt, fish, and gather pursuant to the 1837 Treaty. *Mille Lacs II*, 861 F.Supp. at 841. Specifically, the court held that neither the 1850 Executive Order nor the 1855 Treaty extinguished the usufructuary rights reserved in the 1837 Treaty. *Id.* at 823-35. In addition, the court held that the usufructuary rights reserved by the Band included the rights to harvest resources for commercial purposes, and were not limited to use of any particular techniques, methods, devices or gear. *Id.* at 838. Finally, it ruled that any regulation imposed by the State must be necessary to ensure public health and safety, and that the State could not impose its own regulations if the Chippewa could establish tribal regulations adequate to meet conservation, public health and public safety needs. *Id.* at 838-39.[7]

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[7] After the Phase I trial, the State, the Counties, and the six Minnesota landowners immediately appealed the *Mille Lacs II* decision. *See* 861 F.Supp. at 840. This court dismissed the appeals from the district court's Phase I order as premature. 48 F.3d 373 (8th Cir.1995). The Counties and the six Minnesota landowners also moved for a preliminary injunction to prevent the Mille Lacs Band from violating state and federal conservation laws pending resolution of the case. The district court denied their request, 864 F.Supp. 102 (D.Minn.1994), and this court affirmed, 66 F.3d 332 (8th Cir.1995) (unpublished table decision).

3. *Mille Lacs III* (*Mille Lacs Band of Chippewa Indians v. Minnesota*, No. 3-94-1226 (D.Minn. Mar. 29, 1996))

After the Phase I order in *Mille Lacs II*, several Wisconsin Bands[8] of Chippewa were allowed to intervene as plaintiffs. The State moved for summary judgment against the Wisconsin Bands, arguing that previous litigation before the Court of Claims and the Indian Claims Commission barred their claims, and that a treaty signed by the Wisconsin Bands in 1854 extinguished any usufructuary rights guaranteed in the 1837 Treaty. *Mille Lacs III*, slip op. at 7. The Counties moved for summary judgment against the Wisconsin Bands as well, arguing that at the time of the 1837 Treaty, the Wisconsin Bands did not occupy lands or exercise hunting and fishing rights in Minnesota, and that this fact barred their claim. The Counties also argued, despite the ruling in *Mille Lacs I*, that the 1850 Executive Order extinguished the Wisconsin Bands' rights. *Id.* The six Minnesota landowners also moved for summary judgment against the Wisconsin Bands, and the Wisconsin Bands and the Mille Lacs Band moved for summary judgment dismissing various defenses. *Id.* at 7-8. The district court[9] issued summary judgment in favor of the Wisconsin Bands, and denied the defendants' motions for summary judgment. *Id.* at 41-42.

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[8] *See supra* n. 2.

[9] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

4. *Fond du Lac* (*Fond du Lac Band of Chippewa Indians v. Carlson*, No. 5-92-159 (D.Minn. Mar. 18, 1996))

In 1992, the Fond du Lac Band brought a separate suit against state officials, also claiming continuing rights to hunt, fish, and gather pursuant to the 1837 Treaty and its 1854 Treaty. Two Minnesota landowners intervened as defendants.[10] The district court issued a bifurcation order similar to the order signed in the *Mille Lacs* case. In October 1994, the court[11] held that the Fond du Lac Band's claims were not barred by Eleventh Amendment, indispensable parties or statute of limitations defenses. This court affirmed the rejection of the Eleventh Amendment defense in an interlocutory appeal. *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253 (8th Cir.1995). In March 1996, the district court issued a ruling on Phase I issues, holding that the Fond du Lac Band retains hunting, fishing, and gathering rights under both the 1837 Treaty and the 1854 Treaty.

5. *Mille Lacs IV* (*Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F.Supp. 1362 (D.Minn.1997))

In June 1996, the district court consolidated Phase II of the *Mille Lacs* case with the portion of the *Fond du Lac*

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[10] These landowners are Robert J. Edmonds and Michael Sheff. All eight landowners (the two in *Fond du Lac* and the six in *Mille Lacs*) will be referred to throughout this opinion as "the Landowners."

[11] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

case relating to the 1837 Treaty. In the consolidated Phase II, the State and the Bands stipulated to a Conservation Code and Management Plan, under which tribal hunting, fishing, and gathering would be regulated. Though the State and the Bands were able to resolve many issues through this stipulation, some issues remained unresolved, and were submitted to the district court on motions for summary judgment. On January 29, 1997, the district court[12] issued an order resolving these issues. It approved the Conservation Code and Management Plan and rejected defendants' arguments to make a further allocation of the resources affected by the Code and Plan. *Mille Lacs IV*, 952 F.Supp. at 1385-94. The court also held that exercise of treaty rights on private lands would be limited to those open to the public by operation of state law, but that the Bands may not hunt on unposted, unenclosed, nonagricultural lands open to public hunting pursuant to state statute. *Id.* at 1376-79.

The *Fond du Lac* case and the *Mille Lacs* case were consolidated on appeal.[13] The basic issues presented on appeal are (1) whether the suit is barred in federal court under the Eleventh Amendment; (2) whether the 1850 Executive Order issued by President Zachary Taylor revoked the Bands' usufructuary rights; (3) whether subsequent treaties of 1854 and 1855 have extinguished the usufructuary rights; (4) whether the claims asserted by the Bands have been precluded by prior litigation; (5)

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[12] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

[13] Jurisdiction of this appeal is authorized under 28 U.S.C. § 1291.

whether the Bands' rights were repealed, under the equal footing doctrine, by Minnesota's admission into the Union; (6) whether the rights, if they still exist, are limited by the "moderate living" doctrine; (7) whether several other affirmative defenses were erroneously rejected by the district court; and (8) in the Bands' cross-appeal, whether the district court erred in barring the Bands from hunting on unposted, unenclosed, nonagricultural lands open to public hunting.

II.

Eleventh Amendment

We turn initially to the Landowners' arguments that these suits are barred in federal court because of the sovereign immunity of the State of Minnesota.[14] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by

[14] The State does not raise the Eleventh Amendment defense in its brief, and we question whether the Landowners have standing to raise the defense on behalf of the State. However, the Landowners filed a letter pursuant to F.R.A.P. 28(j) asserting as additional authority to support the Eleventh Amendment claim the Supreme Court's recent decision of *Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). In response, the State filed a letter joining in the Landowners' defense. Normally, if an issue is not raised in the brief itself, nor argued at the time of oral argument, it is deemed waived. *Bechtold v. City of Rosemount*, 104 F.3d 1062, 1068 (8th Cir.1997). Nonetheless, assuming without deciding that the issue is properly before us, we reject it on the merits.

Citizens or Subjects of any Foreign State." The Bands are accorded the same status as a foreign sovereign. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 2581, 115 L.Ed.2d 686 (1991).

In *Mille Lacs*, the State raised the defense of sovereign immunity before the district court,[15] which rejected it on two grounds. First, the court noted that the claims by the United States are not barred by the Eleventh Amendment, citing *Blatchford*, 501 U.S. at 782-83, 111 S.Ct. at 2582-83, and *United States v. Minnesota*, 270 U.S. 181, 195, 46 S.Ct. 298, 301, 70 L.Ed. 539 (1926). *Mille Lacs I*, 853 F.Supp. at 1128. Therefore, the court held that because "the Band and the United States seek the same relief in this action, Minnesota's sovereign immunity is not compromised." *Id.* (citing *Arizona v. California*, 460 U.S. 605, 613-14, 103 S.Ct. 1382, 1388-89, 75 L.Ed.2d 318 (1983)). Second, the court ruled that the Band's claim for prospective relief against the Commissioner of Natural Resources in his official capacity falls within the Eleventh Amendment exception set out in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).[16] *Mille Lacs I*, 853 F.Supp. at 1128-29.[17]

[15] The State is a defendant in the *Mille Lacs* suit, but not in the *Fond du Lac* suit.

[16] The *Ex parte Young* doctrine excepts from the Eleventh Amendment bar suits "brought in federal court against state officials in their official capacities for prospective injunctive relief to prevent future violations of federal law." *Fond du Lac*, 68 F.3d at 255.

[17] The district court in *Mille Lacs III* similarly rejected the argument by the State and the Landowners that the Wisconsin Bands' claims must be dismissed on Eleventh Amendment grounds. The court relied on the earlier decision in *Mille Lacs I*,

As to the court's first holding, the Landowners urge that the United States did not initiate the suit and appears only as a trustee intervening in the action. This observation, while true, is not controlling. The United States has fully participated in all proceedings on behalf of the Bands. As an intervenor, it has the right to continue the suit even without the presence of the Bands. *See Diamond v. Charles*, 476 U.S. 54, 68, 106 S.Ct. 1697, 1706-07, 90 L.Ed.2d 48 (1986). Therefore, because the United States has the right to bring these claims in federal court, the State's sovereign immunity is not compromised and the Eleventh Amendment does not bar these claims. *See Arizona v. California*, 460 U.S. at 614, 103 S.Ct. at 1388-89 ("Nothing in the Eleventh Amendment has ever been seriously supposed to prevent a State [from] being sued by the United States.") (internal quotations omitted).

In *Fond du Lac*, the district court denied the defendant state officials' motion for summary judgment based on Eleventh Amendment immunity. Our affirmance rejected this defense on the ground that the claims fell within the *Ex parte Young* exception to the Eleventh Amendment. *Fond du Lac*, 68 F.3d at 256-57. As such, that ruling is the law of the case in *Fond du Lac*, unless superseded by an intervening Supreme Court case. *See Uhl v. Swanstrom*, 79 F.3d 751, 755 (8th Cir.1996) (noting that the " 'law of the case' doctrine does not apply when an intervening decision from a higher tribunal renders a prior determination erroneous").

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and on this court's opinion in *Fond du Lac. Mille Lacs III*, slip op. at 11.

The Landowners filed a 28(j) letter, with which the State concurred, asserting that this court's ruling in *Fond du Lac* was in error and has now been superseded by the Supreme Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). We disagree. In *Coeur d'Alene*, the Coeur d'Alene Tribe and several individual tribe members sued the State of Idaho and various state officials and agencies in federal court "[a]lleging ownership in the submerged lands and bed of Lake Coeur d'Alene and of the various navigable rivers and streams that form part of its water system." *Id.* at ___, 117 S.Ct. at 2032. The Court held that the action was barred in federal court because it was the "functional equivalent of a quiet title action which implicates special sovereignty interests" and therefore did not fall within the *Ex parte Young* exception to the Eleventh Amendment. *Id.* at ___, 117 S.Ct. at 2040.

The principal decision, written by Justice Kennedy, espouses a case-by-case balancing approach for applying the *Ex parte Young* exception. *See id.* at ___, 117 S.Ct. at 2038-40. However, the majority of the Court, including the four dissenters and the concurring opinion signed by three Justices, rejects Justice Kennedy's balancing test. Regardless, *Coeur d'Alene* does not make the *Ex parte Young* exception inapplicable to this case. Our conclusion that this case falls within the exception is supported by the concurring opinion's appraisal of *Ex parte Young*: "[A] *Young* suit is available where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective." *Id.* at ___, 117 S.Ct. at 2046 (O'Connor, J., concurring) (emphasis omitted). Moreover, the principal opinion reaffirmed the *Young*

principle, noting that "where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar." *Id.* at ___, 117 S.Ct. at 2038 (citation omitted). Neither the State nor the Landowners present factors from this case which would counsel against applying the *Ex parte Young* exception even under Justice Kennedy's balancing approach.

Justice O'Connor, in the concurring opinion, distinguished *Coeur d'Alene* from *Ex parte Young* as follows:

> First, as the Tribe concedes, the suit is the functional equivalent of an action to quiet its title to the bed of Lake Coeur d'Alene. . . . Second, the Tribe does not merely seek to possess land that would otherwise remain subject to state regulation, *or to bring the State's regulatory scheme into compliance with federal law.* Rather, the Tribe seeks to *eliminate altogether* the State's regulatory power over the submerged lands at issue – to establish not only that the State has no right to possess the property, but also that the property is not within Idaho's sovereign jurisdiction at all.

Id. at ___, 117 S.Ct. at 2043-44 (emphasis added).

We hold that the Eleventh Amendment does not bar any of the claims before us. In *Mille Lacs*, where the State is a party, the United States has intervened and seeks the same relief as the Bands. The remaining claims in *Mille Lacs* and the claims in *Fond du Lac* seek prospective injunctive relief against state officials in their official capacities for continuing violations of the Bands' federal

treaty rights. As such, they fall squarely within the *Ex parte Young* exception to the Eleventh Amendment.

III.

1850 Executive Order

On February 6, 1850, President Zachary Taylor issued the following Executive Order:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi by the Fifth Article of the Treaty made with them on the 29th of July 1837, "of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" by that treaty to the United States . . . are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.[18]

The district court in *Mille Lacs II* rejected the defendants' argument that this order validly terminated usufructuary rights reserved by the Bands in the 1837 Treaty. First, the court held that President Taylor did not have authority to

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[18] In the years in and around the execution of the 1837 Treaty, removal of tribes was the official policy of the United States government. President Andrew Jackson, one of the most vigorous proponents of the policy, began pushing for removal legislation shortly after his election in 1829. "After one of the bitterest debates in the history of Congress," the Removal Act was enacted into law on May 28, 1830. Grant Foreman, *Indian Removal* 21 (1932). The Act authorized the President to enter into treaties exchanging lands for compensation and removal. Many removal treaties (not including the 1837 Treaty at issue here) followed.

order the Bands to remove, and that the portion of the Executive Order revoking the Bands' usufructuary rights was not severable from the portion of the document ordering removal. *Mille Lacs II*, 861 F.Supp. at 824-26. In the alternative, the court held that even if the Order were backed by the necessary authority or if the revocation portion were severable, the Order did not effect a revocation because the 1837 Treaty did not grant the President unfettered discretion to revoke the usufructuary rights it preserved. *Id.* at 826-27. The Seventh Circuit had used this approach in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir.1983) (*LCO*), where it held that the 1837 Treaty conferred upon the President [sic] discretion to revoke the usufructuary rights only if the Bands misbehaved. *See id.* at 357 (interpreting the 1837 Treaty and a separate treaty signed in 1842 to allow revocation of usufructuary rights "only if the Indians were instrumental in causing disturbances with white settlers").[19]

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[19] In the *LCO* litigation, the Lac Courte Oreilles Band of Chippewa Indians, which signed the 1837 Treaty, brought suit against the State of Wisconsin and state officials seeking a declaratory judgment that it retained usufructuary rights under the 1837 Treaty and a separate 1842 Treaty. *Id.* at 343-44. The court held that the rights continue to exist. The scope of the LCO Band's rights has been the subject of continued litigation in federal district court and the Seventh Circuit. *See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 760 F.2d 177 (7th Cir.1985) (*LCO II*); 653 F.Supp. 1420 (W.D.Wis.1987) (*LCO III*), 668 F.Supp. 1233 (W.D.Wis.1987) (*LCO IV*); 686 F.Supp. 226 (W.D.Wis.1988) (*LCO V*); 707 F.Supp. 1034 (W.D.Wis.1989) (*LCO VI*); 740 F.Supp. 1400 (W.D.Wis.1990) (*LCO VII*); 775 F.Supp. 321 (W.D.Wis.1991) (*LCO VIII*); *see also* Kenneth D. Nelson, Comment, *Wisconsin, Walleye, and the Supreme Law of the Land: An Overview of the Chippewa Indian Treaty Rights Dispute in Northern Wisconsin*, 11 Hamline J. Pub.L. & Pol'y 381 (1990).

Again in the alternative, the district court held that the entire 1850 Order was unlawful because it violated the United States' duty to act in good faith in its dealings with Indians. *Mille Lacs II*, 861 F.Supp. at 826-27. Finally, the court determined that even if the 1850 Order were valid and gave the President unfettered discretion, it was repealed by implication because it was never enforced. *Id.* at 829-30.

The State, the Counties, and the Landowners argue that the district court erred in each of these holdings. They advocate that the Executive Order is valid because the 1837 Treaty gave the President unfettered discretion to revoke the Bands' rights. Before we can analyze the 1837 Treaty and the scope of the President's discretion, it is necessary to determine whether President Taylor had the power to issue the 1850 Executive Order.[20]

The rule to be followed in examining executive orders is that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Youngstown*, 343 U.S. at 585, 72 S.Ct. at 866. An executive order without congressional or

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[20] The Counties have argued that judicial review of the 1850 Order is barred by the political question doctrine. We find this argument to be foreclosed by *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), which sets out the standards by which courts review executive orders. In addition, review of the 1850 Order does not fall within any of the categories of nonjusticiable political questions set out in *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962).

constitutional authority is unconstitutional. *Id.* "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 637, 72 S.Ct. at 871 (Jackson, J., concurring), *adopted in Dames & Moore v. Regan*, 453 U.S. 654, 669, 101 S.Ct. 2972, 2981, 69 L.Ed.2d 918 (1981). The Bands argue that Congress required Indian consent as a prerequisite to removal, that it was not present here, and that the Order was therefore against congressional will and the dictates of *Youngstown*.

The 1830 Removal Act authorized the President to convey lands west of the Mississippi to "such tribes or nations of Indians as *may choose* to exchange the lands where they now reside, and remove there." 1830 Removal Act, ch. 148, 4 Stat. 411 (emphasis added). Though President Jackson advocated an aggressive policy, including possible use of force to achieve Indian removal, it is clear the Removal Act was "entirely permissive." Wilcomb E. Washburn, 3 *The American Indian and the United States: A Documentary History* 2169 (1973).

The requirement of Indian consent is easily drawn from the language of the statute. It is buttressed, however, by the statements and actions of congresses and presidents in and after 1830. For example, President Jackson, in his 1829 State of the Union Address, proffered a removal policy and urged that it "should be voluntary, for it would be as cruel as unjust to compel the aborigines to abandon the graves of their fathers and seek a home in a distant land." 1 *The State of the Union Messages of the Presidents*, 1790-1966, at 310 (Fred L. Israel ed., 1966). In

his 1835 State of the Union Address, President Jackson advocated further Indian removal "as fast as their consent can be obtained." *Id.* at 438, quoted in *Mille Lacs II*, 861 F.Supp. at 824. Indian consent is also exemplified by the many treaties between the United States and various Indian tribes made after 1830 where removal was negotiated. *See Mille Lacs II*, 861 F.Supp. at 794 n. 7 (listing four such treaties). In 1837, Congress passed an appropriations act specifically to fund the negotiations that led to the 1837 Treaty and others like it. Act of March 3, 1837, ch. 31, 5 Stat. 158. If removal could have been effected through a simple executive order, the difficult process of treaty negotiation would have been unnecessary. The Removal Act did not authorize the President to achieve removal through unilateral means; rather, it "authorized the President to negotiate with selected tribes and to *induce them, if possible*, to exchange their eastern and southern homelands for substitute reserves lying across the Mississippi. . . . " John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture*, 59 U.M.K.C. L.Rev. 503, 509 (1991) (emphasis added).

The defendants do not cite to any evidence indicating that the President was authorized to remove the Bands without their consent. The State argued below that the Executive Order was valid because "[b]y the 1830s, the policy of both Congress and the President was clear: to remove the Indians to locations west of the Mississippi, by treaty if possible, by force if necessary."[21] However,

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[21] The State is partially correct. Scholars have noted that the law of voluntary removal was not always faithfully followed. *See, e.g.*, Jill Norgren, *Protection of What Rights They Have:*

such unilateral and unlawful action cannot control the clear meaning and intent of the Treaty.

It is clear to us that the Bands in this litigation did not give consent for removal. Defendants do not point to a single document indicating that the 1837 treaty negotiations included discussion of removal.[22] In 1837, before negotiations began, Commissioner of Indian Affairs Carey A. Harris sent a letter to Wisconsin Territorial

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Original Principles of Federal Indian Law, 64 N.D. L.Rev. 73, 98 (1988) (noting that the "Removal Act articulated a voluntary process of removal to be agreed upon through a process of law," but that the reality of removal was "something quite the contrary"); Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 St. Thomas L.Rev. 567, 578-79 (1995) ("Generally speaking, treaties of removal appear to often have been imposed by force or fraud, tainted by corruption or lack of authority by Indian representatives."); *see also* Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 Stan. L.Rev. 13, 38 n. 150 (1990) (observing that a removal act passed in 1863 "was the first time the United States had chosen to remove Indians unilaterally by statute, without even the semblance of agreement by treaty").

[22] Justice Jackson's three categories of presidential authority set forth in his concurring opinion in *Youngstown* indicate that where, as here, an executive order contravenes congressional will, the order can stand if the President can draw on his constitutional powers. *Youngstown*, 343 U.S. at 637, 72 S.Ct. at 871 (Jackson, J., concurring); *see also Regan*, 453 U.S. at 668-69, 101 S.Ct. at 2980-81 (adopting Justice Jackson's categories as "analytically useful"). The Constitution does not help President Taylor here, however, because it confers upon Congress, not the President, authority over Indian affairs. U.S. Const. art II, § 2, cl. 2 (conferring treaty power to the President but only with the advice and consent of the Senate); *id.* at art. I, § 8, cl. 3 (Indian commerce clause); *see also LCO*, 700 F.2d at 361 n. 14.

Governor Henry Dodge instructing him on the object of the treaty, which was to "procure from [the] Indians a tract [of land] . . . valuable for its pine woods which cover it." Letter from Commissioner of Indian Affairs Carey A. Harris to Henry Dodge and General W.R. Smith (May 13, 1837). As the district court noted, "The letter did not contain any reference to the removal of the Chippewa, the 1830 Removal Act, or the 1837 appropriations act." *Mille Lacs II*, 861 F.Supp. at 794. The district court concluded, "Neither Dodge nor the Chippewa intended or understood that any provision of the 1837 Treaty was to provide for removal from the ceded territory." *Id.* at 798. Given the evidence, most prominently the treaty itself, that the Bands did not approve removal, we cannot conclude that the finding that the Bands did not consent to removal is clearly erroneous.[23]

If Congress required consent for removal, and the Bands did not consent, then President Taylor had no authority for his 1850 Executive Order of removal. This conclusion does not, however, end our inquiry into the matter of the Executive Order. Defendants argue that the portion of the Order extinguishing the 1837 usufructuary rights is separate and severable from the portion of the Order requiring removal.

The test for whether a valid portion of an otherwise unconstitutional statute can be severed also applies to executive orders. *Matter of Reyes*, 910 F.2d 611, 613 (9th Cir.1990). In the early case of *Champlin Ref. v. Corporation*

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[23] Neither did the Bands consent to removal after the 1837 Treaty was signed. The defendants do not point to any conduct indicating as much, nor can we find any in the record.

Comm'n, 286 U.S. 210, 234, 52 S.Ct. 559, 564-65, 76 L.Ed. 1062 (1932), the Court established its test for severability:

> The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

See also New York v. United States, 505 U.S. 144, 186, 112 S.Ct. 2408, 2434, 120 L.Ed.2d 120 (1992) (using this test); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 1479-80, 94 L.Ed.2d 661 (1987) (same).

On its face, the Order contains two provisions that seem separate – one ordering revocation of treaty rights, and one ordering removal. However, the test for severability requires us to look at more than the text of the Order. As is the case with a court's construction of statutory law, the bottom line in assessing severability turns on the intent of the drafter, in this case President Taylor, and the purpose of the text, in this case the Executive Order. *See EEOC v. CBS, Inc.*, 743 F.2d 969, 971 (2d Cir.1984) ("Whether or not we should sever an unconstitutional provision from the remainder of the statute in which it appears is primarily an issue of legislative intent."); *Scheinberg v. Smith*, 659 F.2d 476, 481 (5th Cir.1981) ("[T]he question is . . . whether, at the time the statute was enacted, the legislature would have passed it absent the constitutionally objectionable provision."), *overruled on other grounds by Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The

task before us, therefore, is to determine whether President Taylor would have issued an executive order revoking the Bands' treaty rights without also ordering removal. The district court found that the revocation portion of the Order was included in order "to encourage removal." *Mille Lacs II*, 861 F.Supp. at 826. While the court determined that this observation argues against severability, the observation could cut the other way. A strong argument could be made (although it is not) that the President would have issued a revocation order without the removal provision, because it would have "encouraged" Bands to remove from the ceded territory without actually ordering them to do so. If the Bands were denied their rights to hunt, fish, and gather, they would be deprived of their sustenance to exist on the ceded lands, and thus would be forced to remove. As such, a revocation order standing alone would have allowed the President to attempt to do indirectly what he could not do directly.

Notwithstanding these arguments, on the basis of the record before us, we agree with the district court that the revocation portion of the Order cannot be severed from its companion provision. The purpose of the Order was to mandate removal, and this purpose was integral to the entire Order. *See Zbaraz v. Hartigan*, 763 F.2d 1532, 1545 (7th Cir.1985) ("Severance is improper if the unconstitutional provision is an integral part of the statutory enactment viewed in its entirety.") (internal quotation omitted), *aff'd by an equally divided court*, 484 U.S. 171, 108 S.Ct. 479, 98 L.Ed.2d 478 (1987). Other than our above-stated conjecture, there is no evidence that revocation of

usufructuary rights would have been made independently of the removal mandate. We may envision a scenario where this indirect method of removal could have been followed, but we have in the record no statement by anyone indicating such a plan had ever been considered, much less employed.[24] All of the historical evidence surrounding the Order relates to removal. Without evidence

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[24] Indeed, even the direct order of removal and the corresponding revocation of usufructuary rights were never implemented. On August 23, 1851, the Acting Commissioner of Indian Affairs wrote to the Secretary of the Interior and recommended abandoning the removal policy and modifying the Executive Order. Thereafter, Commissioner of Indian Affairs Luke Lea ordered suspension of the Order. The new Commissioner of Indian Affairs, George Manypenny, adopted this policy of abandoning removal in his 1854 report. When President Franklin Pierce took office in 1853, his administration "replaced the old removal policy with a policy of creating reservations for the Chippewa on lands ceded in earlier treaties." *Mille Lacs II*, 861 F.Supp. at 808. In 1854 and 1855, the government negotiated treaties which followed this new policy creating Chippewa reservations still in place today. *See infra* Parts IV, V (discussing the 1854 and 1855 Treaties).

As to the revocation order, Minnesota Territorial Governor Willis Gorman wrote to Commissioner Manypenny in 1855 regarding a dispute over a dam, and stated that the Bands retained hunting and fishing rights in the area of the dam. *See id.* at 810. Annuity payments made after the 1850 Order included equipment for hunting and trapping. *See id.* at 808 (listing lead, shot, powder, guns, and traps as provisions paid to the Bands). The district court found that "[g]overnment policy between 1851 and 1860 indicates that the government no longer expected the Chippewa to remove and that it expected the Chippewa to continue to hunt, fish, and gather on their ceded lands with the assistance of goods provided by the government." *Id.*

that the scenario we have outlined had even been contemplated, we cannot sever the revocation portion of the Order and hold that it is valid standing alone. *See Scheinberg*, 659 F.2d at 482 ("[W]e cannot judicially sever a portion of an enactment on the authority of a wholly speculative, and insupportable, interpretation of legislative intent."). We hold that the entire 1850 Executive Order is invalid because it was issued without presidential authority.[25]

IV.

1854 Treaty

By 1854, Congress began to pursue a reservation policy to replace its failing removal policy. Commissioner Manypenny indicated in his 1854 Annual Report that reservations should be established for the Chippewa still living in the lands ceded by the 1837 and 1842 Treaties. An authorization act for this purpose was debated in May 1854, but it failed to pass the Senate. Nonetheless, negotiations went forward, and a treaty resulted. Treaty with the Chippewas, Sept. 30, 1854, 10 Stat. 1109. The Wisconsin Bands and the Fond du Lac Band, but not the Mille

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[25] As we noted previously, the defendants challenge each of the district court's alternative rulings on this issue. Our holding as to the validity of the Order, however, obviates any need to consider the district court's alternative rulings and the defendants' remaining arguments. We therefore decline to discuss the misbehavior standard read into the 1837 Treaty by the *LCO* and *Mille Lacs II* courts, the good faith doctrine which the district court held was violated by the United States in issuing the 1850 Order, and the alleged repeal by implication.

Lacs Band, were signatories to the Treaty, which created reservations within the lands ceded in the 1837 and 1842 Treaties in exchange for cession of title to various other tracts of land. The Landowners and the State argued below that the 1854 Treaty, through the creation of reservations, extinguished the 1837 Treaty rights of the Wisconsin Bands. This argument does not apply to the Mille Lacs Band, because it was not a signatory to the Treaty, nor to the Fond du Lac Band, because defendants have not pursued this argument against that Band.[26] The district court rejected the State's and the Landowners' arguments and held that the 1854 Treaty did not extinguish the usufructuary rights reserved under the 1837 Treaty. *Mille Lacs III*, slip op. at 33. On appeal, the Landowners urge us to reverse the district court.[27]

The Landowners rely on *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941), where the Supreme Court determined that creation of a reservation by the United States and acceptance of it by the Walapai Indians "amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation." *Id.* at 357-58, 62 S.Ct. at 257 (footnote omitted). The Court made it clear that mere establishment

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[26] The 1854 Treaty also reserved to various Bands, including the Fond du Lac Band, a right to hunt and fish on the newly ceded lands. Claims for these usufructuary rights were brought by the Fond du Lac Band, but are not a part of this consolidated case. *See Fond du Lac*, slip op. at 22-34 (determining that the 1854 Treaty granted usufructuary rights in Minnesota to the Fond du Lac Band, but declining to decide the scope of those rights until Phase II of the case).

[27] The State has not addressed the 1854 Treaty in this court.

of a reservation does not automatically extinguish rights to lands outside the reservation, but it determined that the facts and circumstances of the case indicated extinguishment of title. In 1865, Congress had established a reservation for the Walapai Indians in an effort to induce them to abandon their ancestral lands. *Id.* at 351-53, 62 S.Ct. at 253-55. The Tribe did not accept the reservation at that time, and the Court determined that its rights to the land were not extinguished by the mere passage of the act creating the reservation. *Id.* at 353-54, 62 S.Ct. at 255. In 1881, however, the Tribe accepted the reservation. The Court determined that "[i]n view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved." *Id.* at 358, 62 S.Ct. at 257.

The district court distinguished *Santa Fe*: "Not only is the historical context completely different, the Court's analysis was based upon aboriginal title whereas in this case, the usufructuary rights at issue have been found to be treaty rights." *Mille Lacs III*, slip op. at 28. We agree. The circumstances involved in *Santa Fe*, where the argument was over aboriginal title rather than usufructuary rights reserved by treaty, are not present here.[28] *See LCO*, 700 F.2d at 351-52 (explaining the legally significant differences between aboriginal title and treaty-recognized

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[28] We note also the distinction in the law between usufructuary rights, at issue here, and title or occupancy, at issue in *Santa Fe*. *See LCO*, 700 F.2d at 352 ("[T]reaty-recognized rights of use depend neither on title nor right of permanent occupancy.").

rights). Most importantly, however, the evidence is overwhelming that neither party intended the 1854 Treaty to disturb usufructuary rights. The Treaty established reservations and ceded lands different from the lands ceded in the 1837 Treaty, and explicitly preserved usufructuary rights on the newly ceded lands. *See id.* at 364 ("[T]he inclusion in the 1854 treaty of a reservation of usufructuary rights by the Minnesota Chippewas suggests, in our view, that the LCO band believed their usufructuary rights [reserved in the 1837 and 1842 Treaties] to be secure and unaffected by the treaty."); *Mille Lacs II*, 861 F.Supp. at 815 (concluding that the government did not intend to extinguish usufructuary rights in a different treaty with the Chippewa in part because the Treaty does not contain references to the rights, and "[w]hen the United States extinguished reserved rights of fishing in other treaties, it included explicit language ending those rights and providing monetary compensation").

V.

1855 Treaty

In December 1854, Congress passed the previously rejected bill establishing authority for treaty negotiations. The bill provided retroactive authority for the 1854 Treaty, and authority to negotiate a follow-up treaty. On January 4, 1855, Commissioner Manypenny directed Governor Gorman to begin the negotiation process for a new treaty with the Chippewa "respecting their claim to lands in Minnesota." *Mille Lacs II*, 861 F.Supp. at 812 (citation omitted). The new treaty was negotiated from February 12 to February 22, 1855. It was signed by the Mississippi,

Pillager, and Lake Winnibigoshish Bands of Chippewa, a group which includes the Mille Lacs Band but not the Fond du Lac Band or the Wisconsin Bands. Article 1 of the Treaty ceded a ten million acre tract of land located north and northwest of the 1837 ceded territory. Treaty with the Chippewas, Feb. 22, 1855, art. 1, 10 Stat. 1165. Article 1 also states, "And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." The Treaty established the Mille Lacs reservation in the 1837 ceded territory, but it does not mention hunting, fishing, and gathering rights at all, and the usufructuary rights in the 1837 Treaty were never mentioned in treaty negotiations. *Mille Lacs II*, 861 F.Supp. at 815.

The State, the Counties and the Landowners contend that the language in the 1855 Treaty conveying "all right, title, and interest, . . . in, and to any other lands in the Territory of Minnesota or elsewhere" extinguished the Mille Lacs Band's usufructuary rights on off-reservation lands. The district court in *Mille Lacs II*, after "a careful examination of the historical record established at trial," made the following findings: (1) the government did not intend for the 1855 Treaty to extinguish the usufructuary rights reserved in the 1837 Treaty, 861 F.Supp. at 815-16, 821; (2) the Chippewa did not intend to give up their 1837 Treaty privilege and they did not understand the 1855 Treaty to have that effect, *id.* at 816-18; and (3) both the Band and the United States believed that the 1837 Treaty

rights continued to exist after the 1855 Treaty was signed, *id.* at 818-821.

The 1855 Treaty is void of explicit language extinguishing the Band's usufructuary rights, nor does it mention the 1837 Treaty. In analyzing the broad language of the 1855 Treaty, we must view it in its historical context to determine whether the parties meant it to revoke usufructuary rights. The circumstances surrounding the Treaty do not indicate that either side intended or understood the treaty to work such a revocation. We look first at the interpretation understood by the Bands. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 99 S.Ct. 3055, 3069-70, 61 L.Ed.2d 823 (1979) (A "treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."). The historical evidence demonstrates that the Bands signing the 1855 Treaty did not intend to give up their usufructuary rights. During the negotiations, a Chippewa representative repeatedly indicated that he understood that the purpose of the Treaty was to purchase land. *Mille Lacs II*, 861 F.Supp. at 813. Chippewa representatives also indicated during negotiations that they would continue to hunt, fish, and gather after the Treaty was negotiated. *Id.* at 814. Indeed, the district court found that in the years after the Treaty was signed, the Chippewa complained to federal officials that state enforcement of game regulations violated their rights under the 1837 Treaty. *Id.* at 831-32.

As to the United States, we note first that the United States knew how to draft a treaty to revoke usufructuary rights, and did not do so in this case. *See, e.g.*, Treaty with

the Middle Oregons, Nov. 15, 1865, art. I, 14 Stat. 751 ("[T]he right to take fish, erect houses, hunt game, gather roots and berries, and pasture animals upon lands without the reservation set apart by the treaty aforesaid – [is] hereby relinquished."); Treaty with Chippewas of Sault St. Marie, Aug. 2, 1855, art. I, 11 Stat. 631 ("The said Chippewa Indians surrender to the United States the right of fishing at the falls of St. Mary's, and of encampment, convenient to the fishing-ground, secured to them by the treaty of June 16, 1820."); Treaty with the Winnebago Indians, Oct. 13, 1846, art. IV, 9 Stat. 878 (paying "forty thousand dollars for release of hunting privileges, on the lands adjacent to their present home"); Treaty with the Sacs and Foxes, Oct. 21, 1837, art. I, 7 Stat. 543 (revoking "the right to locate, for hunting or other purposes, on the land ceded in the first article of the treaty of July 15th 1830"). In addition, the authorization act for the 1855 Treaty directed the President to negotiate a treaty with the Chippewa "for the extinguishment of their title to all the lands owned and claimed by them in the Territory of Minnesota and State of Wisconsin." The United States was clearly concerned about extinguishment of *title*, not usufructuary rights.

The district court's factual findings regarding the intention of the parties to the 1855 Treaty are well supported, and we cannot conclude they are clearly erroneous. Given the absence of any mention of the 1837 Treaty or its usufructuary rights in the 1855 Treaty or its negotiation process, and the lack of evidence that the parties intended to extinguish these rights, we conclude

that the 1855 Treaty did not revoke the 1837 Treaty's usufructuary rights.[29]

Defendants argue, however, that *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985) compels a different result. The Klamath Indian Tribe (the Tribe) had signed an 1864 Treaty ceding lands in Oregon to the United States. The Treaty also created a reservation for the Tribe and secured to them "the exclusive right of taking fish in the streams and lakes, included in said reservation." *Id.* at 755, 105 S.Ct. at 3422. The Treaty did not expressly reserve Indian rights to hunt or fish *outside* the reservation. A large portion of the intended reservation was excluded as a result of survey error.

In 1901, the Tribe agreed to "cede, surrender, grant, and convey to the United States all their claim, right, title and interest in and to" the land mistakenly excluded from the 1864 Treaty. *Id.* at 760, 105 S.Ct. at 3425. The 1901 Agreement did not contain any reference to hunting and fishing rights. When the State of Oregon enforced its conservation laws against the Tribe on the lands ceded in the 1901 Agreement, the Tribe brought suit. The Supreme Court interpreted the 1864 Treaty and the 1901 Agreement to extinguish hunting and fishing rights on ceded lands. *Id.* at 770, 105 S.Ct. at 3430. In coming to its

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[29] The Landowners argue that the usufructuary rights were not mentioned because "the 1850 Order had already been issued revoking the privilege, negating any need to reference it in 1855." If anything, this point indicates that the parties did *not* intend for the 1855 Treaty to revoke usufructuary rights that were, in their minds, nonexistent.

decision, the *Klamath* Court considered that the 1864 Treaty established an exclusive right to hunt and fish on the reservation. Thus the hunting and fishing rights "did not exist independently of the reservation itself" and were ceded in 1901 when the reservation was diminished. *Id.* at 768, 105 S.Ct. at 3429.

The 1864 Treaty rights in *Klamath* were exclusive and *on-reservation* rights, and thus logically extinguished with a relinquishment of a portion of the reservation. The rights at issue in this litigation are *non-exclusive* and *off-reservation* rights, reserved in a treaty not mentioned in the 1855 Treaty or its negotiations. The situations are not analogous and do not compel the same outcome. We hold that *Klamath* does not require reversal, and affirm the district court's holding that the 1855 Treaty did not extinguish the usufructuary rights that are the subject of this litigation.

VI.

Preclusive Effect of Prior Litigation

A. *Court of Claims (Mole Lake) Litigation*

In 1940, several Wisconsin Chippewa Bands, including some of the Bands which are plaintiffs in this action, brought a claim against the United States in the Court of Claims. The action was brought pursuant to an ad hoc jurisdictional statute waiving federal sovereign immunity, which was designed to enable Indian claims for loss

of aboriginal title.[30] *Mole Lake Band v. United States*, 126 Ct.Cl. 596, 598 (Ct.Cl.1953); Act of August 30, 1935, Pub.L. No. 74-410, 49 Stat. 1049. The Fond du Lac Band intervened in the *Mole Lake* litigation on August 30, 1940. *Mole Lake*, 126 Ct.Cl. at 598-99. Neither the Mille Lacs Band nor the State was a party to the case.

The original *Mole Lake* petition set forth multiple claims under various treaties, mostly seeking compensation for lands ceded under the treaties. A portion of the petition included claims contending that federal officials had violated the plaintiffs' usufructuary rights under the treaties.[31] Severed from the original petition were causes of action relating to certain tracts of swamp land and causes of action relating to "public school sections" of land. The swamp land claims were resolved in *Mole Lake Band v. United States*, 134 Ct.Cl. 478, 139 F.Supp. 938 (1956). The school land claims were dismissed in *Mole Lake Band v. United States*, 113 Ct.Cl. 16, 82 F.Supp. 342

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[30] The *Mole Lake* litigation was against the United States. The Bands could not have joined the officers of the State of Minnesota, its counties, or the Landowners in the Court of Claims litigation. The Court of Claims had exclusive jurisdiction over claims against the United States. We note that the United States supports the Bands' argument that the *Mole Lake* litigation does not serve to bar the present litigation under the rules of issue preclusion.

[31] For example, the petition alleged that the United States destroyed "the natural habitat of fish, game and fur bearing animals," and thus "deprived plaintiffs of a great part of the consideration" due them for cessions of land. It also alleged that the United States "failed to protect" the plaintiffs' rights to "unrestricted use [of ceded lands] for hunting, fishing, trapping and camping."

(1949). The remainder of the petition was narrowed to include only seven claims. *Mole Lake*, 126 Ct.Cl. at 597. The Court of Claims stated that the reason for the narrowing of claims was the severance of the swamp land and school land claims, the "institution of suits before the Indian Claims Commission," and the "abandonment of some of the claims not severed out of the petition." *Id.* None of the swamp land claims, the school land claims, or the seven remaining claims included allegations of the denial of usufructuary rights.

The defendants argued to the district court that the *Mole Lake* litigation collaterally estops the Bands' claims in this action. In order for collateral estoppel (issue preclusion) to bar litigation of an issue,

> (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been litigated in the prior action; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment.

Stoebner v. Parry, 91 F.3d 1091, 1094 (8th Cir.1996). In addition, the estopped party must be a party or in privity with a party to the prior litigation. *Wellons, Inc. v. T.E. Ibberson Co.*, 869 F.2d 1166, 1168 (8th Cir.1989).

The district court in *Mille Lacs I* found that although the Mille Lacs Band was a signatory to the 1837 Treaty, it was not in privity with the Bands in the *Mole Lake*

litigation.[32] The court then found in the alternative that *Mole Lake* did not adjudicate whether the Bands retained their usufructuary rights under the 1837 Treaty.[33]

In *Mille Lacs III*, the district court considered whether issue preclusion barred the Wisconsin Bands' claims. In determining that the Wisconsin Bands were not barred by the issues tried in *Mole Lake*, the court adhered to the earlier alternate ruling in *Mille Lacs I* that the issues were not identical and therefore could not serve as a bar under principles of collateral estoppel. *Mille Lacs III*, slip op. at 25. The district court also considered collateral estoppel in *Fond du Lac*, and determined that the Fond du Lac Band was not given a full and fair opportunity to litigate the issue of usufructuary rights in *Mole Lake*. The court concluded, "There is no evidence that a resolution of the usufructuary rights issue was necessary to the final judgment rendered by the Court of Claims in *Mole Lake*." *Fond du Lac*, slip op. at 16. Thus, collateral estoppel did not bar the Fond du Lac Band's claims. *Id.*[34]

On appeal, the Landowners, the Counties, and the State challenge all three of these decisions. They argue that the original petition in the *Mole Lake* proceeding

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[32] The Landowners argued that the Mille Lacs Band was in privity with the Bands in the *Mole Lake* litigation by way of membership in a common tribe.

[33] The State's brief is not helpful in this regard since it merges the *Mole Lake* litigation with the later Indian Claims Commission claims. As our discussion indicates, these are separate questions requiring separate resolution.

[34] Unlike the Mille Lacs Band, the Fond du Lac Band had intervened in the *Mole Lake* litigation, and thus privity was not an issue.

collaterally estops the Bands from bringing their claims in this litigation. A close review of the petition refutes their argument. While the parties dispute whether the usufructuary rights claims in the petition were later litigated, they overlook the fact that the petition does not include any claims under the 1837 Treaty that underlies the Bands' claims here. The petition lists twenty-six treaties which form the basis of the plaintiffs' claims in *Mole Lake*. The list *does not include the July 29, 1837 Treaty* at issue in this case. We can end our collateral estoppel analysis as to the original petition here. Even if the petition can be read to include usufructuary rights claims, it cannot collaterally estop the Bands from later bringing claims for usufructuary rights *under a different treaty*. This is what they have done here, and we hold that they are not barred by the original *Mole Lake* petition from doing so.

We come to the same conclusion when we examine the swamp land cause of action.[35] Under the elements of collateral estoppel set out above, the issue to be barred must have been actually litigated and necessary to the final judgment in the prior action. *Stoebner*, 91 F.3d at 1094. The cause of action in the swamp land proceeding was for damages for the value of land and timber within reservations established in the 1854 Treaty discussed in this opinion. Plaintiffs did not seek relief, as they do here, for the denial of usufructuary rights reserved in the 1837 Treaty. *Mole Lake*, 139 F.Supp. at 939-40; *see also United*

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[35] The two remaining decisions of the Court of Claims mention neither the 1837 Treaty nor the 1850 Executive Order. *See Mole Lake*, 126 Ct.Cl. 596; *Mole Lake*, 113 Ct.Cl. 16, 82 F.Supp. 342.

States v. Gurley, 43 F.3d 1188, 1196 (8th Cir.1994) ("In the final analysis the test would seem to be whether *the wrong for which redress is sought* is the same in both actions.") (quotations and citations omitted; emphasis by the *Gurley* court) *cert. denied*, ___ U.S. ___, 116 S.Ct. 73, 133 L.Ed.2d 33 (1995).

Though the swamp land decision discussed the 1850 Executive Order, it did not decide any issues relating to it, because the court had no reason to do so. *See Mole Lake*, 139 F.Supp. at 939-40; *see also LCO*, 700 F.2d at 360 ("Although the judge discussed the Removal Order in the context of the historical events which culminated in the grant of the reservations lands in 1854 . . . he neither expressed nor had reason to consider the *validity* of the Removal Order.") (emphasis in original). The general discussion of the Executive Order in the swamp land decision cannot support the conclusion that the Order presented an issue necessary to that decision. We hold that the usufructuary rights issue was not actually litigated in the swamp land proceeding. The elements of collateral estoppel are not met, and the doctrine does not work to bar the Bands' claims.[36]

The Landowners also urge this court to apply judicial estoppel to various claims made by the Bands in the *Mole*

[36] Res judicata (claim preclusion) bars a subsequent suit between the same parties or their privies based on the same cause of action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979). The district court noted in *Mille Lacs I* that the State abandoned its res judicata defense because in this case there are different parties than were in the *Mole Lake* and Indian Claims Commission proceedings.

Lake proceedings.[37] The Bands argue that the Landowners did not assert this claim in the district court, and that we should therefore reject it here. None of the district court opinions include a discussion of judicial estoppel, nor can we find the argument in the record. Thus, the Landowners are precluded from raising it on appeal. See *Bursch v. Beardsley & Piper*, 971 F.2d 108, 113 (8th Cir.1992) (refusing to discuss an argument not raised before the district court).

B. *Indian Claims Commission Litigation*

In 1946, Congress created the Indian Claims Commission (ICC) to hear tribal claims arising under the Constitution, laws, treaties, or executive orders and accruing before August 13, 1946. Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049 (formerly codified at 25 U.S.C. § 70(a)). In January 1948, many Minnesota Bands of Chippewa, including the Fond du Lac Band but not, initially, the Mille Lacs Band, brought claims for compensation for lands ceded under the 1837, 1842, 1854, and 1855 Treaties discussed earlier in this opinion. The original petition before the ICC stated that usufructuary rights were "a material consideration" for ceding the lands. It also alleged, "The United States has deprived the plaintiffs

[37] For example, in their brief to the Court of Claims on the swamp land claims, the Wisconsin Bands involved in the litigation stated, "The right of occupancy provided in the Treaties of 1837 and '42 was terminated by an executive order of February 6, 1850." The Landowners argue on appeal that the doctrines of judicial estoppel and collateral estoppel bar the Bands from arguing otherwise here.

and other Indians of the right to hunt and fish upon the ceded lands and upon the land retained by them. . . ." This original petition was assigned to the ICC's Docket 18, which was then severed into three parts: Docket 18-C included claims under the 1837 Treaty and additional treaties; Docket 18-B included claims under the 1855 Treaty; and Docket 18-U included claims under the 1854 Treaty.

On August 9, 1949, the plaintiffs drew up a new petition for Docket 18-C. The complaint alleged that "there was reserved for the various parties to said treaties, and the defendant [the United States] undertook to conserve the same, hunting, fishing and other rights in various lands, all of which were a material consideration for the ceding thereof." In the United States' answer to the complaint, it admitted that the treaties reserved hunting and fishing rights, but denied that it had violated the rights in any way.

On October 23, 1957, the ICC issued an order severing Docket 18-C further, separating causes of action based on treaties other than the 1837 Treaty. The ICC then required the plaintiffs to file a new Docket 18-C complaint, asserting only their claims under the 1837 Treaty. The order provided that the amended complaint "shall be considered as having been filed on August 9, 1949, and shall take the place of said original petition." On August 5, 1959, the Mille Lacs Band joined the existing plaintiffs to file an amended complaint pursuant to the court's order. This amended complaint alleged that the amount paid by the United States for the land ceded in the 1837 Treaty was "grossly inadequate and unconscionable." The

complaint *did not refer to any hunting, fishing, or gathering rights.*

The ICC adjudication of the claims in Docket 18-C spanned several decades and resulted in three different decisions, found at 19 Ind. Cl. Comm. 514 (1968), 26 Ind. Cl. Comm. 22 (1971), and 32 Ind. Cl. Comm. 192 (1973). The ICC responded to the Bands' claims for compensation by valuing the land ceded in the 1837 Treaty for its "highest and most valuable uses," which, the Bands' experts determined, were pine timber and agriculture. The ICC found that the fair market value of the land at the time of the Treaty was $9,875,000. 26 Ind. Cl. Comm. at 59. It subtracted the $847,440 that the United States paid the Bands for the land and awarded the Bands $9,027,560 in full satisfaction of their claims. 32 Ind. Cl. Comm. at 200. The ICC did not, in any of its opinions, mention the hunting, fishing, and gathering rights reserved under Article V of the 1837 Treaty.

In *Mille Lacs I*, the district court analyzed the ICC proceedings under the collateral estoppel doctrine, examined the pleadings and the record of the ICC litigation, and determined that the issue of usufructuary rights was not actually litigated and necessary to the outcome of the case. *Mille Lacs I*, 853 F.Supp. at 1137. The court concluded that the ICC's award of compensation for the lands based on their highest and best valuation "does not indicate that the ICC concluded that the usufructuary rights had been extinguished." *Id.* Therefore, it rejected the defendants' argument that the Mille Lacs Band was collaterally estopped by the ICC litigation.

As to the Wisconsin Bands, the court followed the *Mille Lacs I* ruling, and held that the Bands "are not precluded under the doctrine of collateral estoppel from asserting their claims in this litigation by the prior litigation before the ICC in Docket 18C because the issue of the continued existence of the 1837 privileges were not litigated." *Mille Lacs III*, slip op. at 25.

As to the Fond du Lac Band, the court again held that the Band is not collaterally estopped by the ICC litigation. First, it determined that the original Docket 18 petition does not provide a bar, because "[o]nce a pleading has been amended, the old pleading serves no function in the litigation." *Fond du Lac*, slip op. at 16-17. Second, it concluded that the ICC's valuation of the land for "highest and best use" did not settle the issue of usufructuary rights. *Id.* at 17. The court distinguished *Klamath*, which the defendants argued necessitated a contrary conclusion, by noting that the *Klamath* decision involved a treaty that was silent as to off-reservation hunting and fishing rights, whereas the Treaty here explicitly reserved off-reservation hunting and fishing rights. *Fond du Lac*, slip op. at 20 n. 12.

This second issue is the one on which both the State and the Landowners concentrate on appeal. They argue that the value of usufructuary rights was subsumed in the ICC award, because the award was based on the highest and best use of the land.[38] This measurement,

[38] To the extent that the State and the Landowners rely on the original ICC petition to provide a bar, we agree with the district court's decision in *Fond du Lac* that a complaint that has been amended cannot be revived for purposes of res judicata or collateral estoppel. *See Fond du Lac*, slip op. at 16-17.

according to the State and the Landowners, represents the total value of the land. If the measurement was not intended to include usufructuary rights, these parties contend, the ICC would have made a specific deduction from the calculated value of the land for the value of still-existing usufructuary rights. Since it did not, the argument goes, the ICC award includes payment for the 1837 Treaty rights, and they are extinguished, thus collaterally estopping the Bands from bringing their claims here.

The defendants urge that the Supreme Court's decision in *Klamath* supports their collateral estoppel argument. They contend that *Klamath* stands for the proposition that an ICC award that is silent as to usufructuary rights automatically subsumes and estops future usufructuary rights claims.

In *Klamath*, the ICC had awarded in 1969 over four million dollars to the Tribe as additional compensation for the lands ceded by the 1901 Agreement. 473 U.S. at 762, 105 S.Ct. at 3425-26. The amount of the award "was based on the estimated value of the land for stock grazing and timber harvesting, which the parties had agreed constituted the 'highest and best uses' for the land." *Id.* The ICC opinion in *Klamath* did not mention hunting or fishing rights. Part of the Tribe's argument that its usufructuary rights survived the 1901 Agreement was that the absence of any *ICC payment* for hunting and fishing rights demonstrated that the parties did not intend for them to be *extinguished*. *Id.* at 773, 105 S.Ct. at 3431-32. The Supreme Court rejected the Tribe's contention, holding that "had the parties actually intended to preserve independent hunting and fishing rights for the Tribe on the ceded lands, the [ICC] presumably would have computed

the value of such rights and explicitly subtracted that amount from the price to be paid for land so encumbered." *Id.*

The State and the Landowners seize upon this language, asserting that it requires this court to interpret the ICC's silence as to usufructuary rights as extinguishment of those rights. Their argument, however, fails to appreciate crucial distinctions between the treaty here and the treaty involved in *Klamath*. Here, the 1837 Treaty explicitly reserves off-reservation usufructuary rights. In *Klamath*, the treaty at issue was silent as to off-reservation usufructuary rights. As the district court herein observed:

> The critical distinction of whether the rights to hunt and fish were reserved in a prior treaty leads to a critical difference in the way the ICC's silence on those rights should be treated. If the rights were reserved in a treaty, the ICC would have had to find that the rights had been extinguished; thus, silence implies no determination as to those rights. If the rights were not reserved, silence would imply that the rights were determined to have been disposed of by the cession of the land. *Klamath* deals with the latter situation; this case presents the former.

Fond du Lac, slip op. at 20 n. 12. The ICC opinions in this case are not cursory. We cannot accept the conclusion that they extinguished an important body of rights bargained for and explicitly reserved in a treaty without any mention of those rights. *Cf. Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir.1983) (rejecting the contention that a party could rely, for collateral estoppel purposes, "solely on general language of [ICC] settlement documents to sweep in Article IV grazing rights" where "all specific language in the

pertinent documents, including the original petition, refers only to the low compensation paid for lands ceded in Article I").[39]

The defendants' argument also fails to appreciate another difference between this case and *Klamath*. In *Klamath*, the Supreme Court used the ICC's silence on the issue of hunting and fishing rights as one factor indicating that the 1901 Agreement extinguished hunting and fishing rights on ceded lands. 473 U.S. at 773, 105 S.Ct. at 3431-32. The Court concluded, "The absence of specific compensation for the rights at issue is entirely consistent with our interpretation of the 1901 Agreement." *Id.* at 774, 105 S.Ct. at 3432. The ICC's silence was used by the Court to buttress its conclusion as to the *interpretation* of the Tribe's agreement with the United States. To view the ICC's silence in this case to mandate preclusion of hunting and fishing rights claims is to give *Klamath* an interpretation it simply cannot bear. We therefore hold that the ICC proceedings do not collaterally estop the Bands from bringing usufructuary rights claims here.

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[39] This conclusion applies equally to the defendants' arguments under *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200 (9th Cir.1991). There, the Ninth Circuit determined that claims for hunting and fishing rights did not survive an ICC extinguishment of title and correlating award, but it emphasized that the treaty at issue *did not expressly reserve hunting and fishing rights*. *Id.* at 202-03.

VII.

Equal Footing Doctrine

The defendants argue that any rights the Bands acquired under the 1837 Treaty were extinguished upon Minnesota's admission into the Union in 1858.[40] They assert that under the "equal footing doctrine," those rights became void when Minnesota was granted statehood and acquired the sovereign trust and police power over its natural resources. The district court rejected this as a basis for defeating the Bands' usufructuary rights. We affirm.

On May 11, 1858, the thirty-fifth Congress passed legislation admitting the State of Minnesota into the Union. Minnesota was admitted "on an equal footing with the original states in all respects," and there was no reservation or exception made for rights secured to the Bands. An Act for the Admission of the State of Minnesota into the Union, ch. 31, 11 Stat. 285 (1858). The equal footing doctrine, a reflection of Congress' language admitting the states, "requires that all states admitted into the Union after the original thirteen states be admitted on 'equal-footing' with the original states; the newly admitted states must have the same rights and sovereignty at the time of admission as the original states."

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[40] The "equal footing" defense was presented below in *Fond du Lac* and in *Mille Lacs* with respect to the Wisconsin Bands, but not with respect to the Mille Lacs Band. However, because this is a question of law, fully briefed by the parties and addressed twice by the district court, we think the issue is properly before us as to all of the Bands. *See Shannon v. Ford Motor Co.*, 72 F.3d 678, 684 (8th Cir.1996).

Crow Tribe of Indians v. Repsis, 73 F.3d 982, 990-91 (10th Cir.1995) (citations omitted), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1851, 134 L.Ed.2d 951 (1996). The basis for the defendants' argument for applying the doctrine herein is an amalgamation of two related points: (1) any rights conferred by the federal government in the 1837 Treaty were extinguished when Minnesota became a state and acquired the same rights and sovereignty reserved under the Tenth Amendment[41] to the original thirteen states, and (2) in the act admitting Minnesota into the Union, Congress' silence regarding the Bands' usufructuary rights constituted an abrogation of those rights.

The defendants argue that the controlling law is found in *Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896), and *Repsis*, 73 F.3d 982. In *Ward*, the relevant treaty provision secured to the Bannock Indians the "right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts." 163 U.S. at 507, 16 S.Ct. at 1077. The Court described this right as "temporary and precarious," noted that the legislation admitting Wyoming into the Union did not reserve any rights for the Indians, and held the right to hunt did not survive Wyoming's statehood. *Id.* at 515, 16 S.Ct. at 1080. In *Repsis*, the Tenth Circuit analyzed an 1868 Treaty with the same relevant language as *Ward*. *Repsis*, 73 F.3d at 987.

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[41] The Tenth Amendment to the Constitution provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Tenth Circuit affirmed the dismissal of the Tribe's action based on rights under the 1868 Treaty, holding that the Supreme Court's interpretation in *Ward* of the same treaty language controlled and therefore the Tribe's rights were "repealed by the act admitting Wyoming into the Union." *Id.* at 992 (*citing Ward*, 163 U.S. at 514, 16 S.Ct. at 1079-80). The Tenth Circuit found important the distinction between treaty-based rights which are temporary and those which are continuing:

> [T]he equal-footing doctrine does not prevent the United States from creating a right in a territory which would be binding on the state upon its admission into the Union. However, in order for such a right to be binding on the state, it must be a continuing or perpetual right – a right that is intended at its formation to be continuing against the United States and its grantees, including the state.

Repsis, 73 F.3d at 991.

The State argues that in applying the equal footing doctrine, this court must use a two-part analysis to determine whether the 1837 Treaty rights survived Minnesota's admission into the Union: first, we must decide whether the rights were intended to be "temporary" or "permanent"; second, if the right is temporary, we must decide whether it conflicts with the state's sovereignty. As to the first question, the State asserts that the right is temporary because the phrase "during the pleasure of the President" expressly provides for the potential revocation of the right. Whether or not a misbehavior standard was understood to modify the President's discretion, the State contends that the simple fact that under some scenario

the rights could be revoked proves that they were intended to be temporary in nature. As to the second question, the State argues that the rights are irreconcilable with its sovereignty, and therefore were extinguished, because any right to hunt and fish off-reservation in violation of state law conflicts with its right to control the natural resources within its borders.

We reject the application of the equal footing doctrine defense for several reasons. First, the district court noted the language in the 1837 Treaty securing the Bands' usufructuary rights must be distinguished from the "temporary and precarious" rights addressed in *Ward* and *Repsis*. *Mille Lacs III*, slip op. at 22; *see also Fond du Lac*, slip op. at 31 (analyzing similar usufructuary rights in the 1854 Treaty). The treaties in *Ward* and *Repsis* reserved rights on the "unoccupied lands of the United States." The standard of when "unoccupied" lands become "occupied" is certainly vague, and could logically include the granting of sovereignty to a newly formed state. *See Fond du Lac*, slip op. at 31. Moreover, in *Ward*, the Court interpreted the treaty rights therein to secure the right to hunt in hunting districts on lands owned by the United States. *See Ward*, 163 U.S. at 509-10, 16 S.Ct. at 1078. Therefore, the Court found the rights to be tied to the United States' ownership of the lands. In contrast, the rights secured to the Bands in Article 5 of the 1837 Treaty are in no way tied to ownership, but instead were intended to be continuing rights.[42]

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[42] The defendants argue that because the rights could be revoked by the President under some standard, they are similar to the "temporary and precarious" rights analyzed in *Ward* and

Second, the Bands' usufructuary rights are not irreconcilable with the State's sovereignty. This second part of the two-part analysis poses the important question of whether in our constitutional system of dual sovereignty the rights secured to the Bands in a treaty with the federal government can bind the State. In *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), the Supreme Court analyzed a treaty which reserved on ceded lands the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory." *Id.* at 378, 25 S.Ct. at 663. The Court rejected the argument that these rights were repealed upon Washington's admission into the Union, concluding:

> The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

Id. An important part of the Court's analysis was recognition of the fact that the United States had not *granted* usufructuary rights to the Indians in the territory. "[T]he treaty was not a grant of rights to the Indians, but a grant

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Repsis. However, the fact that the rights could be revoked by the President, or abrogated by Congress like any other treaty right, does not deprive them of their "continuing" nature.

of rights from them – a reservation of those not granted." *Id.* at 381, 25 S.Ct. at 664. As such, the United States did not convey to the Indians anything which the State could claim the right to control, but rather the United States secured title to vast areas of land for the benefit of the future state in exchange for the Indians' reservation of usufructuary rights. *Cf. United States v. Forty-Three Gallons of Whiskey*, 93 U.S. (3 Otto) 188, 197-98, 23 L.Ed. 846 (1876) (rejecting the argument that Minnesota's sovereignty is infringed by enforcement of a treaty provision making federal law prohibiting the sale or introduction of liquor applicable to lands ceded in the treaty).

In *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942), the Court followed *Winans* and reconciled similar off-reservation usufructuary rights with the state's regulatory authority. The Court upheld an Indian's right to rely on off-reservation treaty rights that conflict with state law unless the state regulations are necessary for conservation of the resource in question. *Id.* at 684, 62 S.Ct. at 864. We think *Winans* and *Tulee* show that usufructuary rights reserved by the Bands on lands ceded to the United States in a treaty are not hopelessly in conflict with Minnesota's regulatory authority.[43] Because the federal government clearly had the power to enter into the

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[43] Though the State has stipulated to the applicability of a Conservation Code and Management Plan, the Counties and Landowners argue that the Bands should be subject to existing state regulation rather than writing their own. The district court held, "The State may not impose its own regulations if the Band can effectively self-regulate and if tribal regulations are adequate to meet conservation, public health, and public safety needs." *Mille Lacs II*, 861 F.Supp. at 839. The Supreme Court has consistently rejected arguments that Indian treaties reserve to

1837 Treaty, and because the Bands' rights can be reconciled with the State's regulation of the natural resources within its borders, we conclude that upholding the Bands' usufructuary rights does not offend the State's sovereignty.[44]

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the Indians no more fishing rights than those enjoyed by non-Indian citizens. Instead, the Court has established a "conservation necessity" standard, under which "nontreaty fishermen might be subjected to any reasonable state fishing regulation serving any legitimate purpose, [but] treaty fishermen are immune from all regulation save that required for conservation." *Fishing Vessel*, 443 U.S. at 682, 99 S.Ct. at 3072 (citing *Antoine v. Washington*, 420 U.S. 194, 207-08, 95 S.Ct. 944, 951-52, 43 L.Ed.2d 129 (1975); *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398, 88 S.Ct. 1725, 1728, 20 L.Ed.2d 689 (1968); *Tulee*, 315 U.S. at 684, 62 S.Ct. at 864; *Winans*, 198 U.S. at 384, 25 S.Ct. at 665; *Ward*, 163 U.S. at 504, 16 S.Ct. at 1076). We will not decide today whether, as the district court held, these cases mean that the State must allow treaty fishers to establish their own code. However, the stipulation between the Bands and the State appears to meet the conservation necessity standard, and thus we will not disturb it at this time.

[44] The Landowners called our attention to the Supreme Court's recent opinion in *Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). In *Printz*, the Court struck down a portion of the Brady Act which required state officers to implement a federal regulatory program as violative of the Tenth Amendment. *Printz* is not relevant to the decision in this case. There is no federal law commanding state regulation here. In fact, the State voluntarily stipulated to the Bands' Conservation Code and Management Plan regarding regulatory issues. In addition, this is a case about state law infringing on rights guaranteed by federal law, and there is no question that federal courts have the power to order state officials to comply with federal law. *Printz*, at ___ n. 16, 117 S.Ct. at 2382 n. 16 (citing *New York v. United States*, 505 U.S. 144, 179, 112 S.Ct. 2408, 2430, 120 L.Ed.2d 120 (1992)); *see also Fond du Lac*, 68 F.3d at 256 n. 3.

Finally, the rule that Congress can abrogate treaty rights with the Indians only when its intention is expressed clearly and plainly counsels against application of the equal footing doctrine herein. In *United States v. Dion*, 476 U.S. 734, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986), a unanimous opinion, the Supreme Court stated that "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 739-40, 106 S.Ct. at 2220. The defendants have presented no evidence surrounding the legislation admitting Minnesota into the Union from which we could conclude that Congress intended to abrogate the 1837 Treaty rights.

VIII.

Moderate Living Doctrine

In *Fishing Vessel*, the Supreme Court first articulated the "moderate living doctrine." The Court held that certain treaty language entitled the plaintiff Indian tribes to a presumptive fifty percent share of all harvestable fish passing through "usual and accustomed" fishing runs. 443 U.S. at 670, 99 S.Ct. at 3066-67. The Court then limited its holding by stating that this presumptive fifty percent take is a maximum, not a minimum, and can be reduced "if tribal needs may be satisfied by a lesser amount." *Id.* at 685, 99 S.Ct. at 3074. The Court emphasized that "the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no

more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living." *Id.* at 686, 99 S.Ct. at 3075.

The Landowners and the Counties contend that this language from *Fishing Vessel* should be applied in this litigation to mean that "the level of treaty harvest allowable is measured by the Bands' economic need." These parties contend that the court should take all sources of income to the Bands into account, find that the Bands have achieved a moderate standard of living, and hold that the treaty right has either been extinguished or limited to exercise for ceremonial purposes only.[45]

The district court addressed these arguments in *Mille Lacs IV*, splitting them into two separate issues. 952 F.Supp. at 1385-94. First, the court assessed whether resource allocation was necessary at all. *See id.* at 1385-89. It determined, agreeing with the Bands, that "before a party can receive the equitable relief of allocation, the party seeking an allocation must establish that their right to a fair share of a particular harvestable resource has been substantially or irreparably injured as a result of the other party's harvest of such resource." *Id.* at 1389.

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[45] The Landowners connect this argument to an equal protection argument, urging that economic need is the only "compelling interest" that might justify "different treatment" between "two classes of citizens." Even if this argument were otherwise properly raised and applicable, it ignores the obvious fact that the "class of citizens" with treaty rights is not Native Americans generally, but only those Bands which signed the 1837 Treaty.

The court then addressed the moderate living doctrine. According to the court, all defendants below argued that "before the allocation of a resource should be quantified, the Court must first determine whether or not the Bands have achieved a moderate standard of living," looking to all sources of income to make this determination. *Id.* The court concluded, examining *Fishing Vessel*, that

> [w]hat *Passenger Fishing Vessel* and its predecessors establish is this: if an allocation of a resource must be made, such allocation should be quantified to fulfill the purposes of the treaty, while at the same time recognizing the rights of non-Indian harvesters to a resource. Thus, the threshold issue is not whether the Bands have achieved a moderate standard of living, but what was the purpose and intent of the treaty, and what amount of resources are needed to fulfill such purpose and intent. Where it is determined that the resource cannot meet the needs of both the non-Indians and the Bands, an allocation should be made.

Mille Lacs IV, 952 F.Supp. at 1393. It then determined that the 1837 Treaty provides the Bands "the right to continue a way of life based on hunting, fishing and gathering." *Id.* (emphasis omitted). Since the Bands had not yet had the opportunity to choose to continue with such a way of life, the court declined to address the moderate living doctrine. *Id.* at 1394.

We first address whether the district court erred in refusing to make an allocation, beginning with a discussion of *Fishing Vessel*, which is crucial to our understanding of the issue.[46] The litigation which led to the *Fishing Vessel* decision was a dispute over tribal fishing rights in the Pacific Northwest, obtained under various treaties negotiated by Isaac Stevens, Governor and Superintendent of Indian Affairs in Washington Territory in the 1850s (the Stevens Treaties). The signatory tribes ceded lands to the United States, but reserved "the right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." In 1970, the United States, on its own and as trustee for seven Indian Tribes, brought suit against the State of Washington, seeking an interpretation of the treaties and an injunction requiring the State to protect the Tribes' share of runs of anadromous fish. *Fishing Vessel*, 443 U.S.

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[46] Below, the State had asserted that allocation was necessary because the demand for certain resources exceeded the available supply. *Mille Lacs IV*, 952 F.Supp. at 1386. The State was following the reasoning of *LCO VII*, 740 F.Supp. at 1414, which allocated harvest of antlerless deer because of heavy competition for the species. *See Mille Lacs IV*, 952 F.Supp. at 1386-88. On appeal, the State does not challenge the district court's decision not to make an allocation on this basis. Although the Landowners and the Counties term their arguments as driven by the moderate living doctrine, they hit upon the initial allocation issue. There is of course significant overlap between the issue of allocation and the moderate living doctrine issue; therefore, we shall address them both. We do not, however, express an opinion on the appropriateness of the allocation made in *LCO VII*. For further explanation of the *LCO* litigation and its numerous district court opinions, *see Mille Lacs IV*, 952 F.Supp. at 1388.

at 669-70, 99 S.Ct. at 3066-67. The Supreme Court rejected the State's argument that the language in the Stevens Treaties reserves to the Tribes only an *equal opportunity* to take fish passing through traditional tribal fishing areas. *Id.* at 681-83, 99 S.Ct. at 3072-73. It held instead that the treaties secured the right to take a share of each run of fish. *See id.* at 683, 99 S.Ct. at 3073 ("[T]he treaty secured the Tribe's right to a substantial portion of the run, and not merely a right to compete with nontreaty fishermen on an individual basis."). It then noted that "an equitable measure of the common right should initially divide the harvestable portion of each run that passes through a 'usual and accustomed' place into approximately equal treaty and non-treaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount." *Id.* at 685, 99 S.Ct. at 3074. The district court "start[ed] with a 50-50 division and adjust[ed] slightly downward on the Indians' side when it became clear that they did not need a full 50%." *Id.* The Supreme Court affirmed this apportionment.

The Court's discussion of apportionment and the context of the *Fishing Vessel* litigation make it clear that the Court's concern in apportioning the fish harvest was twofold. First, it saw the district court's apportionment as necessary to protect the scarce natural resources at stake. *See id.* at 669, 99 S.Ct. at 3066 ("[N]either party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce."); *Id.* at 686, 99 S.Ct. at 3074 (noting that the district court "realized that some ceiling should be placed

on the Indians' apportionment to prevent their needs from exhausting the entire resource and thereby frustrating the treaty rights of 'all [other] citizens of the Territory' "); *see also* Dana Johnson, *Comment, Native American Treaty Rights to Scarce Natural Resources*, 43 U.C.L.A. L.Rev. 547, 549 (1995) (asserting that the Fishing Vessel litigation began because in the period preceding the institution of the suit, the anadromous fish stock in Washington had drastically declined). Second, the Court interpreted the Stevens Treaties as securing to "both sides . . . a right to take a fair share of the available fish." *Fishing Vessel*, 443 U.S. at 684-85, 99 S.Ct. at 3074 (emphasis added). According to this interpretation, the "in common with" language included in the treaty guarantees fishing rights to both treaty and nontreaty fishers. Thus, the Court was concerned that its decision ensure that "neither party . . . deprive the other of a 'fair share' of the runs." *Id.* at 684, 99 S.Ct. at 3073. Such deprivation was possible and even had begun to happen in *Fishing Vessel*, because of the migratory nature of anadromous fish, which hatch in fresh water, migrate to the ocean where they reach mature size, and eventually complete their life cycle by returning to the fresh water place of their origin to spawn. *Id.* at 662, 99 S.Ct. at 3062-63. This life cycle, and the modern fishing practices of nontreaty fishers, meant that the nontreaty fishers "had the potential to harvest all of the steelhead and salmon before they ever reached the Indians' fishing grounds." *LCO III*, 653 F.Supp. at 1434. Nontreaty fishers had dominated the fisheries and excluded most treaty fishers from participation. *Fishing Vessel*, 443 U.S. at 668-69, 99 S.Ct. at 3065-66. Thus, Indian treaty rights which had once been exercised

freely had become significantly impinged, leading to the lawsuit and ultimately, to allocation.

The dual concerns of the *Fishing Vessel* Court which led to an equitable apportionment (and subsequent reduction under the moderate living doctrine) are simply not present in the litigation at bar. First, there has been no showing here that any resource at issue is in ecological danger. *See LCO III*, 653 F.Supp. at 1434 (refusing allocation because "[n]either party has presented evidence that any particular species is endangered in the ceded territory"). The State and the Bands have agreed to a Conservation Code and Management Plan which will govern the Bands' management of their members' hunting, fishing, and gathering activities. *Mille Lacs IV*, 952 F.Supp. at 1366. The State and the Bands have also agreed to "a series of Protocols to coordinate harvest management and resource assessment." *Id.* at 1366-67. At oral argument, the State conceded that its position was that under the Code, there was no danger of depletion of resources. It appears to us that the parties have taken careful steps to ensure conservation of Minnesota's natural resources, and should be commended for doing so. The Conservation Code and Management Plan they have drawn up is in effect an allocation of resources between treaty and nontreaty harvesters. It is understandable that the Counties and Landowners, neither of which was a party to the stipulation agreeing to the Code and Plan, dispute the *de facto* allocation made therein. However, the Counties and Landowners have not made a showing of scarcity of a resource under the Code and Plan that convinces this court that the district court should have used its equitable powers and mandated a further allocation.

The second concern of the Court in *Fishing Vessel* was the infringement of the treaty rights of the Indians. This concern was noted by the district court in this case, which held that "before a party can receive the equitable relief of allocation, the party seeking an allocation must establish that their right to a fair share of a particular harvestable resource has been substantially or irreparably injured as a result of the other party's harvest of such resource." *Mille Lacs IV*, 952 F.Supp. at 1389. We agree that this rule, when combined with an allowance for apportionment for conservation necessity, is the standard set by *Fishing Vessel*.

It must be remembered, however, that the standard was applied only *after* a determination that each party had a right to a fair share of the resource, based on the Court's interpretation of the treaty language. *See Fishing Vessel*, 443 U.S. at 680-85, 99 S.Ct. at 3071-74. There has been no argument or ruling here regarding the existence and nature of nontreaty fishers' rights under the language of this treaty. In addition, the Counties and Landowners have not made a showing that their right, whatever it may be, to any resource has been harmed. For these reasons, we must reject their pleas for apportionment.

The above discussion of apportionment, however, does not entirely answer the defendants' arguments in this area. The Counties and Landowners contend that the moderate living doctrine establishes a separate right to apportionment whenever it can be proven that holders of a treaty right have achieved a moderate standard of living through any source or sources of income. We agree with the Bands' assertion to the court below – that this

analysis is "a serious misconception about the function of the moderate standard of living doctrine." *Mille Lacs IV*, 952 F.Supp. at 1389. The doctrine was applied by the Supreme Court in *Fishing Vessel after* the district court had made an apportionment of a natural resource between treaty and nontreaty users of that resource. The moderate living doctrine does not establish a *right* to apportionment, but is rather a part of the *method* of apportionment once a court has determined that division of a resource is necessary. *See Fishing Vessel*, 443 U.S. at 685-86, 99 S.Ct. at 3074-75. Since we have determined that apportionment is not necessary in this case, we, like the district court, have no occasion to consider the moderate living doctrine.

In sum, we hold that under *Fishing Vessel*, an equitable apportionment in a treaty case such as this is not appropriate unless one of two conditions is met: (1) conservation of the resource makes apportionment necessary; or (2) the existence and scope of a party's right to the resource has been determined, and that right is substantially harmed due to another party's harvest of that resource. Further, we hold that *the moderate living doctrine itself cannot be applied to require apportionment*. Rather, the doctrine may be appropriate to consider if in the future an allocation under the above standard is necessary.[47]

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[47] We note that a portion of *Mille Lacs IV* could be read to indicate otherwise. At one point in that opinion the court states that the moderate living doctrine should be applied to fulfill the purpose and intent of a treaty, "while at the same time recognizing the rights of non-Indian harvesters to a resource." 952 F.Supp. at 1393. The court then acknowledges the *Mille Lacs I*'s determination as to the purpose of the treaty, which was to provide the Bands "the right to continue a way of life based on

IX.

Additional Defenses Claimed by the Counties

The Counties appeal the denial of two additional defenses. First, they contend that because the Wisconsin Bands sued Wisconsin officials for violating their 1837 Treaty rights in LCO, they are barred by res judicata from suing Minnesota officials for violating the same rights. They contend that *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983), where the Supreme Court carved out a narrow exception to the mutuality rule, applies here to bar the Bands' suit. We disagree. The

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hunting, fishing and gathering." *Id.* at 1393. Finally, the court holds that

> the Bands must be given the opportunity to choose whether or not to continue with a way of life that is based on hunting, fishing and gathering. At this time, the Bands have not had the opportunity to make that choice, as the State has not allowed them to exercise their rights without the threat of state regulation. Until the Bands have had a reasonable opportunity to exercise their treaty rights, this Court will not address the moderate standard of living doctrine.

Id. at 1394. We are concerned that this portion of this discussion could be misconstrued to allow reduction of the Bands' portion of a harvestable resource if the Bands choose not to continue a way of life based on hunting, fishing, and gathering. We therefore emphasize that the district court states clearly that it will not address the allocation issue until a showing has been made under "Section III, A" of its opinion, which determines that allocation is appropriate only where a party's fair share of a resource has been substantially or irreparably injured. *Id.* at 1389. As noted above, we add to this holding by reading Fishing Vessel to require allocation when an allocation is necessary to conserve a natural resource or a party's right to a portion of the resource at issue.

proceedings in *Nevada* were unique; they involved comprehensive water rights adjudication, in which many non-party water appropriators had relied on a prior decree as much as the parties to the action, making res judicata appropriate because of the special need to finally quantify reserved water rights. *See Nevada*, 463 U.S. at 143-44, 103 S.Ct. at 2924-25. The district court was correct in holding that res judicata does not apply. *See Mille Lacs III*, slip op. at 34-36.

Second, the Counties argue that the Wisconsin and Fond du Lac Bands do not hold usufructuary rights in the Minnesota portion of the 1837 ceded territory because, allegedly, none of these Bands used and occupied the area at the time of the Treaty. The district court rejected the argument. *See Mille Lacs III*, slip op. at 39; *Fond du Lac*, slip op. at 36-37. All of the cases cited by the Counties in support of its argument include treaty language which supports a limitation on the scope of the right. The 1837 Treaty does not tie usufructuary rights to historic use or occupancy, and thus the Counties' urgings defy the plain language of the Treaty. We affirm the district court on this issue.

X.

Additional Defenses Claimed by the Landowners

The Landowners make myriad additional arguments, including (but not limited to) the following:[48] (1) the

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[48] The Landowners' briefs do not help us to sort out the substantive arguments they make. While their combined briefs deal substantively with approximately twenty-three issues, the

Bands' claims are barred by various statutes of limitations; (2) the district court lacked § 1983 jurisdiction; (3) Landowners are entitled to a new Phase I trial because the district court exhibited a "pattern of unfairness" which prejudiced the Landowners; (4) the government's survey and sale of land to settlers constituted a revocation of the 1837 Treaty rights; (5) treaties of 1863 and 1864 and the Nelson Act establish state regulation over the hunting and fishing activities of the Bands; and (6) this court should reinstate the Landowners' counterclaims against the United States if we determine that the 1837 Treaty rights exist. We have given these arguments full consideration and have determined them to be without merit.

XI.

The Bands' Cross-Appeal

In Phase I of the *Mille Lacs* case, the district court held that since the 1837 Treaty rights do not include a right of access, Band members may exercise their rights only on public lands and private lands open to public hunting, fishing, and gathering. *Mille Lacs II*, 861 F.Supp. at 836. In Phase II, the parties sought a definition of

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briefs list forty-seven issues in a "Statement of Issues" spanning thirteen pages not numbered to be included in the page count. This technique is, of course, an attempt to avoid reasonable page limitations imposed by this court. For the sake of brevity, we have not mentioned each and every argument raised by the Landowners, but those we do not mention, we have considered and reject.

"private lands open to public hunting, fishing, and gathering." *Mille Lacs IV*, 952 F.Supp. at 1376. The Bands argued that the phrase included "private lands that are undeveloped, non-agricultural and non-posted lands, which, according to statute, are open to the public for hunting." *Id.* at 1377 (citing Minn.Stat. § 97B.001). Minn.Stat. § 97B.001 provides that any person may hunt on private land that fits the above description if such person has not been notified orally that they may not enter the land by the owner, occupant, or lessee of the private land. The court in Phase II held that the lands falling under Minn.Stat. § 97B.001 are not lands upon which the Bands may exercise their rights, because "allowing the exercise of the usufructuary rights by owner consent would potentially provide individual Band members more rights than other Band members." *Mille Lacs IV*, 952 F.Supp. at 1378-79.

The Bands challenge this ruling on appeal, arguing that it is inconsistent with the Phase I decision. In response, the State argues that the second ruling merely clarified the first, and that the two rulings are consistent. We affirm. The Phase I and Phase II decisions are not inconsistent. In Phase I, the district court held that generally, the rights extend to "private lands open to public hunting, fishing, and gathering." *Mille Lacs II*, 861 F.Supp. at 836. The court, interpreting this holding in Phase II, accepted the State's argument that a "distinction between private lands open to the public generally and indiscriminately and private lands to which owner consent is necessary is crucial." *Mille Lacs IV*, 952 F.Supp. at 1378. The distinction is well-reasoned and should not be disturbed by this court. *See id.* at 1378-79 (noting that if the

Bands were allowed to fish and hunt on private lands subject to the discretion of the private landowners, law enforcement officers "would have the undue burden of having to contact private land owners to determine if consent was provided to certain individuals before being able to determine whether laws were violated").

XII.

Conclusion

For the reasons set forth above, we affirm the district court's rulings in *Mille Lacs I*, *Mille Lacs II*, *Mille Lacs III*, *Mille Lacs IV*, and *Fond du Lac*. These five district court opinions, as well as this appeal, represent only a fraction of the effort expended by the parties and their counsel. We commend all of these participants for their work in presenting the important and complex issues involved in this expedited appeal.

Despite the 160 years that have passed since the signing of the Treaty, it remains good law. One of the hallmarks of our constitutional system is respect for the law, regardless of changing circumstances or the inevitable passage of time. This court is fully cognizant of the significant rights and interests maintained by all of the parties in this litigation. The parties have attempted in good faith by negotiation to resolve their differences. Failing to do so, the courts have the responsibility to decide the issues under prevailing rules of law. We are aware of the professed hardships and compromises all litigants on both sides of this litigation must endure. Yet we are confident that all parties recognize that we are a court of limited jurisdiction, and do not possess the

power to rewrite the treaties or interpret them contrary to principles of settled law to accommodate one group over the other.

We commend particularly the State of Minnesota and the various Bands for their willingness to reach agreement regarding the valuable resources in the Conservation Code and Management Plan. We can only express hope that such spirit of cooperation will continue to prevail and that all parties will recognize the mutual rights of one another as now declared in this opinion.

MILLE LACS BAND OF CHIPPEWA INDIANS, Arthur Gahbow, Walter Sutton, Carleen Benjamin, and Joseph Dunkley, Plaintiffs,

United States of America, Plaintiff-Intervenor,

St. Croix Chippewa Indians, et al., Lac Du Flambeau Band, et al., Bad River Band Of Lake Superior, et al., Lac Courte Oreilles Indians, et al., Sokaogan Chippewa Community, et al., Red Cliff Band of Lake Superior, et al., Plaintiffs-Intervenors,

v.

STATE OF MINNESOTA, Minnesota Department of Natural Resources, and Rod Sando, Commissioner of Natural Resources, Defendants,

Counties of Aitkin, Benton, et al., John W. Thompson, et al., Defendants-Intervenors,

Save Lake Mille Lacs Association, Amicus Curiae.

FOND DU LAC BAND OF CHIPPEWA INDIANS, et al. Plaintiffs,

v.

Arne CARLSON, et al., Defendants.

Nos. 3-94-1226, 5-92-159.

United States District Court,
D. Minnesota,
Third Division.

Jan. 29, 1997.

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of Chippewa Indians, Arthur Gahbow, Walter Sutton, Carleen Benjamin and Joseph Dunkley.

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Larry Burton Leventhal, Leventhal Law Office, Minneapolis, MN, James M. Jannetta, Sault Ste Marie Tribe of Chippewas, Sault Ste Marie, MI, for Bad River Band of Lake Superior Chippewa Indians.

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William Arthur Szotkowski, Stephen Bruce Masten, Jerilyn K. Aune, Michelle E. Beeman, Joseph Patrick Lally, Minnesota Attorney General, St. Paul, MN, for State of Minn., Minnesota Dept. of Natural Resources, Joseph Alexander, Com'r of Natural Resources, Arne Carlson, Governor of Minn., Rodney Sando, Com'r of Natural Resources and Raymond B. Hitchcock, Asst. Com'r of Operations.

Douglas B.L. Endreson, Ann Doris Noto, Sonosky, Chambers, Sachse & Endreson, Washington, DC, Henry M. Buffalo, Jr., Jacobson, Buffalo, Schoessler & Magnuson, Minneapolis, MN, Dennis J. Peterson, Fond du Lac Band of Lake Superior Chippewa, Cloquet, MN, for Fond du

Lac Band of Chippewa, Robert Peacock, Peter DeFoe, Clifton Rabideaux, Herman Wise and George Dupuis.

Lawrence A.G. Moloney, Doherty, Rumble & Butler, Minneapolis, MN, for Save Lake Mille Lacs Association.

Gary E. Persian, Stephen G. Froehle, Persian MacGregor & Thompson, Minneapolis, MN, for John W. Thompson, Jenny Thompson, Joseph N. Karpen, Leroy Burling, Glenn E. Thompson, and Gary M. Kiedrowski.

George Cardinal, pro se.

Zenas Baer, Baer & Assoc., Hawley, MN, for Dale Hanks and Chief Hole in the Day VII, Individually, and on behalf of Mississippi Band of Chippewa Indians.

Robert Michael Small, U.S. Attorney's Office, Minneapolis, MN, William A. White, Sheila A. Hackett, U.S. Department of Justice, Indian Resources Section, Washington, DC, for U.S.

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M. Joan Warren, Warren Law Office, Minneapolis, MN, for Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin.

Stephen G. Froehle, Persian, MacGregor & Thompson, Minneapolis, MN, for Amicus Proper Economic Resource Management Inc., for Amicus Minnesota Deer Hunters Association, for John Thompson, Jenny Thompson, Glenn Thompson, Joseph Karpen, Leroy Burling, and Gary Kiedrowski.

MEMORANDUM OPINION AND ORDER

DAVIS, District Judge.

PROCEDURAL HISTORY

The Mille Lacs Band filed its Complaint on August 13, 1990 claiming the State has adopted and enforced natural resource laws and regulations that violate their privilege of hunting, fishing and gathering guaranteed them by the 1837 Treaty entered into between the United States of America and the Chippewa Indians. In this litigation, the Mille Lacs Band seeks a declaratory judgment that the usufructuary rights granted under the 1837 Treaty continue to exist. The Mille Lacs Band also seeks a declaratory judgment defining the nature and scope of those rights and defining the permissible scope of state regulation upon their usufructuary privileges. Additionally, Mille Lacs seeks an injunction prohibiting enforcement of state fish and game laws against members of the Mille Lacs Band except as authorized in the Court's declaratory judgment.

The parties agreed to bifurcate the case into two phases. In Phase I, the issues to be determined involved whether the 1837 Treaty privileges continue to exist, whether the 1837 Treaty privilege extends to lands now, or previously, in private ownership, and the general nature of any rights guaranteed by the privilege. If the privilege was found to continue, Phase II of the case would address issues of resource allocation and the validity of particular measures affecting the exercise of the privilege.

Trial on Phase I commenced on June 13, 1994 and concluded on July 6, 1994. Based upon the testimony of fourteen witnesses, and over 400 exhibits, Judge Murphy issued her Findings of Fact, Conclusions of Law and Order, holding that the usufructuary rights granted the Mille Lacs Band pursuant to the 1837 Treaty continue to exist. *Mille Lacs Band of Chippewa Indians et al. v. State of Minnesota et al.*, 861 F.Supp. 784, 841 (D.Minn.1994) (*Mille Lacs II*). The general nature of this privilege was determined to be that the Indians understood they had given up their right to harvest timber, but that they did not understand the Treaty imposed any other limitations on the types of resources they could harvest, or that there were any restrictions on the time, place, or manner of the exercise of the privilege. *Mille Lacs II*, at 838. It was noted, however, that the validity of particular measures to regulate the taking or harvesting of resources, including resources taken for commercial purposes, was for Phase II. *Id.* Finally, it was held the 1837 Treaty privileges were not limited to the use of any particular techniques, methods, devices, or gear and whether specific techniques could be regulated for conservation or public

health and safety again was reserved for Phase II. *Id.* The Court also delineated the legal standards for state regulation of hunting, fishing and gathering, while reserving the application of these standards to Phase II. *Id.*, at 838-39.

In September 1994, the Court entered a pretrial order for the Phase II portion of the case. Pursuant to that Order, the parties exchanged pre-trial statements. Plaintiff and Plaintiff-intervenor United States filed a joint statement identifying the state laws and regulations they believed violated the standards for state regulation set forth in the Court's Phase I decision. Attached to their joint statement was a proposed Band conservation code to regulate hunting, fishing and gathering by Band members in the Minnesota Ceded Territory. The State also filed a statement which identified the state laws or regulations it believes is applicable to the Bands and which also identified the State's concerns over the Band's proposed conservation code. Thereafter, a revised joint pretrial statement was filed by the Mille Lacs Band and the United States and a revised Band conservation code submitted on behalf of the six Wisconsin Bands who were applying for intervention.

In March 1995, the Wisconsin Bands were allowed to intervene as plaintiffs in this case. Thereafter, the State, Counties and Landowners moved for summary judgment to limit the exercise of the Wisconsin Bands rights to exercise their privileges in the Minnesota Ceded Territory. This Court denied the motions and held that all Phase I determinations applied equally to the Wisconsin Bands.

Since the exchange of the pre-trial statements, the Mille Lacs Band, the Wisconsin Bands, and the State defendants held numerous meetings and exchanged a vast amount of information in an effort to narrow the issues raised in the pre-trial statements. The result of this effort is a Conservation Code and Commissioner's Orders to implement the Code prepared by the Bands. The Bands have also drawn up a Management Plan which includes a series of measures to govern their management of their members' hunting, fishing and gathering activities. The Bands and the State have agreed to a series of Protocols to coordinate harvest management and resource assessment in the Minnesota Ceded Territory. Based on the Bands' Conservation Code, Commissioner's Orders, Management Plan and Protocols, the Bands and the State have identified specific state laws and regulations that do not, under the present circumstances, meet the standards for state regulation in the Court's Phase I decision, leaving a few specifically identified state laws and regulations as "Unresolved." The resolved and unresolved laws and regulations are identified in Exhibit E to a Stipulation entered into by the Mille Lacs Band, the Wisconsin Bands, the United States of America, and the State of Minnesota.[1] By this Stipulation, the executing parties agree, *inter alia*, that

> 1. Upon adoption of the Band Code, including authorization of State of Minnesota Department of Natural Resources personnel to enforce the

[1] The Stipulation and attached Exhibits are on file with the Clerk of Court. A parallel Stipulation between the Fond du Lac Band and the State has also been filed with the Court.

> provisions of such Code, issuance of the Commissioner's Orders and approval of the Management Plans and Protocols attached as Exhibits A, B, C, and D hereto by one or more of the plaintiff or plaintiff-intervenor Bands, and enforcement of the same, the application to such Bands and their members of the State statutes and regulations listed in Exhibit E hereto as "Resolved", to the extent set forth in Exhibit E, will not be necessary for conservation, public health or safety as those terms were used by the Court in its Phase I decision, and will therefore be unlawful. The only particular State statutes and regulations whose application to Band members remains in dispute in the current phase of this case are listed in Exhibit E as "Unresolved". The positions of the Stipulating Parties with respect to those statutes and regulations are indicated in the Comments column in Exhibit E. Those issues will be presented to the Court for resolution on summary judgment motion or at trial. The Stipulating Parties also agreed that if a Band fails to adopt a conforming conservation code, attempts to rescind or otherwise nullify its code, or substantially fails to enforce provisions of its code, such Band members harvesting within the Minnesota Ceded Territory shall be subject to applicable state laws and regulations.

The Stipulating Parties also agreed that the following issues are not resolved by the Stipulation: 1) resource allocation issues; 2) which private lands may be available for Band harvest under their Conservation Code; 3) natural resource management decision making authority; and 4) whether the Bands may exercise their treaty rights

throughout lakes that are only partially within the Minnesota Ceded Territory, and if not, how to determine the harvest available to the Bands in such lakes.

Before the Court are the motions of the parties for summary judgment on the Phase II issues which are in dispute.

Summary Judgment Standard

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir.1992). To determine whether genuine issues of material fact exist, a court conducts a two-part inquiry. The court determines materiality from the substantive law governing the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Disputes over facts that might affect the outcome of the lawsuit according to applicable substantive law are material. *Id.* A material fact dispute is "genuine" if the evidence is sufficient to allow the fact finder to return a verdict for the non-moving party. *Id.* at 248-49, 106 S.Ct. at 2510-11.

I. Motions for summary judgment on Regulatory Issues

By its motion, Plaintiffs and Plaintiff-Intervenors (hereinafter the "Bands") seek entry of an order which incorporates the terms of the Stipulations and resolves the remaining unresolved regulatory issues identified in

the Stipulations. The State has filed cross motions for summary judgment on the following issues 1) the State's management authority; 2) prohibiting the Bands' exercise of its 1837 Treaty rights outside the Ceded Territory, including portions of lakes outside the Treaty boundary; and 3) the definition of private lands open to the public for hunting, fishing and gathering. The Counties have moved for summary judgment, seeking a declaration that the Court hold valid and applicable to all Band members, all Minnesota conservation laws. Finally, the Landowners have moved for summary judgment regarding the definition of private lands (Motion No. 6), management authority over natural resources (Motion No. 7), and legal standards for State regulation of Bands' exercise of its 1837 Treaty rights (Motion No. 8).

Part of the relief sought by the Landowners is reconsideration of prior rulings. *See* The Landowners' Eighth Motion for Summary Judgment. The proper role of a motion to reconsider is extremely limited: "to correct manifest errors of law or to present newly discovered evidence." *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir.1988); *see also* Rule 59(e), Fed.R.Civ.P. Because the Landowners cannot establish a manifest error of law, and have not presented newly discovered evidence, any motions of the Landowners which seek a reconsideration of prior rulings are denied.

A. Order incorporating terms of Stipulations.

The Bands ask that the Court enter judgment on the regulatory issues incorporated in the terms of the Stipulations. The State agrees that an order incorporating the

terms of the Stipulations is appropriate, but only in the Court's final order. Accordingly, if the Court resolves all remaining issues at the summary judgment stage, a final order will be entered and the State would not object to the Court including an order incorporating the terms of the Stipulations and a declaration that the statutes and regulations listed in Exhibit E thereto will not be applicable to the Bands or their members upon adoption of the referenced Code, Commissioner's Orders, Management Plans and Protocols. The State asserts, however, that if a trial is necessary to determine any issues, an order incorporating the terms of the Stipulations should not be entered until after trial. In response to this argument, the Bands have filed a motion for a preliminary injunction, asking the Court to allow the Bands to engage in interim harvests prior to the Court's final judgment. The motion for entry of a final order or a preliminary injunction shall be discussed later in this opinion.

The Bands and the State assert that the Counties and Landowners will likely object to a declaration which provides that the State statutes and regulations are not applicable to band members. The Bands and the State assert that such a declaration is nonetheless appropriate as 1) the burden is on the State to show that application of its laws is necessary for conservation, public health and safety, but such burden cannot be met as the State has stipulated such laws listed in Exhibit E are not necessary and 2) the Counties and Landowners must provide expert testimony to meet the standard, and they have not presented such testimony.

B. The "Unresolved" statutes and regulations.

As noted above, there are certain state statutes and regulations that are identified as "Unresolved" in Exhibit E to the Stipulations. They are as follows:

> Minn.Stat. § 97A.045. The State argues it retains unilateral authority to determine harvestable surplus levels for both treaty and non-treaty harvests, and that its determinations are not subject to review by the Court.
>
> Minn.Stat. § 97A.121 and Minnesota Rule 6242.0400. The State argues the Bands may not exercise their rights on private lands that are not open to the public and on which landowners consent to Band member hunting or fishing.
>
> Minn.Stat. §§ 97B.081, 97B.311, Minnesota Rules 6232.0300 and .1300. It is the State's position that it is necessary for conservation purposes to prohibit hunting deer at night with the use of lights over bait in December.
>
> Minn.Stat. §§ 97C.325, 97C.331 and Minnesota Rule 6262.0200. The State asserts that it is necessary to prohibit any use of gillnets in lakes that are under 1,000 acres.

1. Legal Standard

The legal standards that govern the State's regulation of treaty hunting, fishing and gathering were previously determined by the Court in *Mille Lacs II*.

> The legal standards for state regulation of Indian usufructuary rights are clearly established and will be relevant to Phase II issues.

The State may regulate the exercise of the privilege in the interest of conservation "provided the regulation meets appropriate standards and does not discriminate against the Indians." *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392, [88 S.Ct. 1725, 20 L.Ed.2d 689] (1968). To demonstrate that any regulation meets appropriate standards, the State "must demonstrate that its regulation is a reasonable and necessary conservation measure and that its application to the Indians is necessary in the interests of conservation . . . " The State may also regulate the privilege to ensure public health and safety if the regulations do not discriminate against the Indian and are "reasonably necessary to prevent or ameliorate a substantial risk to the public health or safety." *Lac Courte Oreilles Band v. Wisconsin*, 668 F.Supp. [1233, 1241-42. (W.D.Wis.1987)]. A public health and safety regulation is reasonable if it meets a three part test:

> First, the State must demonstrate that there is a public health or safety need to regulate a particular resource in a particular area. This requires a showing by the state that a substantial detriment or hazard to public health or safety exists or is imminent. Second, the State must show that the particular regulation sought to be imposed is necessary to the prevention or amelioration of the public health or safety hazard. And third, the State must establish that application of the particular regulation to the tribes is necessary to effectuate the particular public health or safety interest. Moreover, the State must show that its regulation is the least restrictive alternative available to accomplish its health and safety purposes. *Id.*, at 1239.
>
> The State may not impose its own regulations if the Band can effectively self-regulate and if tribal regulations are adequate to meet conservation, public health, and public safety needs. . . .
>
> These clearly established legal standards should be applied to issues of state regulation, but the application of these standards to particular regulations and any allocation issues are reserved for Phase II.

Mille Lacs II, 861 F.Supp. at 838-839.

It is the Bands' position that the State carries the burden of establishing that a particular State regulation is reasonable and necessary for conservation, or public health and safety. If the State fails to submit affidavits showing a genuine issue of material fact exists regarding the necessity of a particular regulation, summary judgment should be entered in the Bands' favor.

2. Harvestable Surplus

In the State's motion for summary judgment on the State's Management Authority, the State asks the Court to provide by order that: 1) the State retains the responsibility and authority for the management of all resources of the State within the Ceded Territory, except as otherwise provided by this Court, and; 2) in the event of a dispute in determining the harvestable surplus level for any species that cannot be resolved by the State and the

Bands, the determination shall be made by the Minnesota Department of Natural Resources ("DNR"). *See*, State's Proposed Order for Motion for Summary Judgment on the State's Management Authority.

As discussed above, the parties have made substantial progress in narrowing the issues left for Phase II of this litigation. As a result of this cooperative effort, the Bands and the State have agreed to a series of Protocols in an effort to coordinate harvest management and resource assessment in the Minnesota Ceded Territory. Protocol # 5 addresses Natural Resource Management in the Minnesota Portion of the 1837 Ceded Territory. Section III of this Protocol addresses Harvestable Surplus and Harvest Management Units.

"Harvestable surplus" is a term that refers to the number or amount of any given species that may safely be taken by hunters or fishers. The harvestable surplus is the total amount of an available species to be divided between the Band harvesters and non-Band harvesters according to the applicable allocation amount. Section III of Protocol # 5 recognizes that the State has developed and utilized methodologies for calculating the harvestable surplus of bear, anterless deer, wild turkey and registered furbearers and that the State wishes to continue using such methodologies and harvest management units for determining the harvestable surplus. The Bands recognize that they do not now have the information or experience to contest the State's methodologies or harvest management units for calculating harvestable surpluses for the named species. Therefore, the Bands have agreed to limit treaty harvests by adopting harvest quotas within each of the State's harvest management units, and will

not object to the continued use of the State's methodologies for calculating harvestable surplus determinations. To better educate the Bands, the State has agreed to fully involve the Bands' technical representatives in the annual calculations of harvestable surplus determinations.

Protocol # 5 also provides that in the event a dispute arises as to harvestable surplus determinations, either party has the option of invoking the mediation process provided in Protocol # 1, or the continuing jurisdiction of the court, "unless the court has determined that one party has the authority to resolve the matter unilaterally and that its decision cannot be challenged in court." Protocol # 5, at 2. In a footnote, it is revealed that the State contends it has the authority to resolve disputes over harvestable surplus determinations unilaterally, and that its decision is not reviewable by the Court. Protocol # 5, at 2, n. 1.

The State asserts that harvestable surplus determinations are highly technical in nature, and, by definition, are conservation based. The determination involves gathering and analyzing data on many species, harvest patterns, gear, habitat and climate changes, as well as other factors that impact how much fish or game is available. Sophisticated mathematical and biological models have been developed over the years to translate data into specific harvest levels. The State is concerned that different biologists may have different opinions about the mechanics of the calculations, and at some point a decision will have to be made on which harvestable surplus level should be utilized. The State argues that it should be the one making such a decision, and that the courts

should not second-guess competing scientific analyses. The State asserts that if the Bands believe the State's decision is based on some motivation other than good science based on legitimate conservation needs, they may ask for Court review. If the Court believes, however, that the State reached a harvestable surplus determination based on the appropriate conservation necessity, the Court should then defer to the State's biologist. The State asserts that that is the approach adopted by the Court in *Lac Courte Oreilles Band of Chippewa Indians v. Wisconsin*, 707 F.Supp. 1034 (W.D.Wis.1989) (*LCO VI*).

In response, the Bands assert Minn.Stat. § 97A.045[2] provides broad authority to the DNR, including a directive "to make special provisions for the management of fish and wildlife to ensure recreational opportunities for anglers and hunters." It does not, however, specifically

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[2] Minn.Stat. § 97A.045, Subd. 1 provides:

The commissioner shall do all things the commissioner determines are necessary to preserve, protect, and propagate desirable species of wild animals. The commissioner shall make special provisions for the management of fish and wildlife to insure recreational opportunities for anglers and hunters. The commissioner shall acquire wild animals for breeding or stocking and may dispose of or destroy undesirable or predatory wild animals.

Subdivision 2 confers upon the commissioner the power to protect a species of wild animal, in addition to any protection provided by the game and fish laws, by limiting or closing seasons or areas of the State or by reducing limits if the commissioner believes such action is necessary to prevent unnecessary depletion or extinction or to promote the propagation and reproduction of a species.

provide the State with unreviewable authority as to harvestable surplus levels.

The Bands assert that the determination of the harvestable surplus levels for a specific species will directly constrain Band harvests, as the harvestable surplus, in effect, determines the size of the Bands' harvest. Therefore, harvestable surplus determinations regulate Band harvest more directly than bag limits, gear restrictions or other types of harvest regulation. The Bands assert that the State's position, in effect, alters the clearly established legal principles that apply to a state's regulation of treaty rights. As set forth above, the burden is on the State to show its regulation is conservation based and is not discriminatory against the Indians' rights. But if the Court adopts the State's argument, the burden would be shifted to the Bands to show the regulation is not conservation based and/or is discriminatory.

The Bands also argue that the State's motion as to its Management Authority is vague and ambiguous and that the declaratory relief sought by the State, with the exception of the harvestable surplus issue, would be inappropriate as there currently is no concrete dispute before the Court – the State asks for a declaration that it can make management decisions without specifying an issue currently in dispute. The State responds to this argument by asserting there is a concrete issue before the Court that needs resolution – that is the Bands' quest for co-management. The State has taken the position that the Bands are seeking co-equal jurisdiction to manage the resources of the State. The State argues the case law supports its position that it has final management authority, and that it need not have to be subjected to second-guessing and

protracted court dispute by the Bands any time the Bands dispute a decision the State makes.

The Court agrees with the position of the Bands that, with the limited exception of the harvestable surplus issue, the State's Motion for Summary Judgment on its Management Authority does not present an issue of "controversy" that is appropriate for judicial determination. Declaratory relief is appropriately applied to cases of actual controversy. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 463-64, 81 L.Ed. 617 (1937).

> A 'controversy' in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Id. at 240-241, 57 S.Ct. at 464 (internal citations omitted). The decision to grant declaratory relief is left within the sound discretion of the court, even where there is a justiciable controversy. *United States v. State of Washington*, 759 F.2d 1353, 1356 (9th Cir.1985) *cert. denied*, 474 U.S. 994, 106 S.Ct. 407, 88 L.Ed.2d 358 (1985). Declaratory relief should always be made with reference to the public interest. *Id.*, at 1357. "Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the

proceedings and afford relief from the uncertainty and controversy faced by the parties." *Id.*

In *Washington*, the Ninth Circuit vacated the district court's grant of declaratory relief on what was designated by the district court as the environmental issue in the "protracted litigation over Indian fishing rights in the Pacific Northwest." *Id.*, at 1354-55. The district court had declared that "the right to take fish necessarily includes the right to have those fish protected from man-made despoliation, so that the treaties impose upon the State a corresponding duty to refrain from degrading or authorizing the degradation of the fish habitat to an extent that would deprive the treaty Indians of their moderate living needs." *Id.*, at 1355.

Finding the issuance of the declaratory relief on the environmental issue was contrary to sound judicial discretion, the court stated:

> The legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case. Legal rules of general applicability are announced when their consequences are known and understood in the case before the court, not when the subject parties and the court giving judgment are left to guess at their meaning. It serves neither the needs of the parties, nor the jurisprudence of the court, nor the interest of the public for the judiciary to employ the declaratory judgment procedure to announce legal rules imprecise in definition and

> uncertain in dimension. Precise resolution, not general admonition, is the function of declaratory relief.

Id., at 1357.

With the exception of the harvestable surplus issue, there is no concrete issue before the Court with regard to the State's management authority. The State does not present specific facts or a specific dispute upon which to apply declaratory relief. Thus, if the State's motion was granted, the Court, as well as the parties, would have to guess at the meaning such a ruling would make.

The parties agree, however, that the harvestable surplus issue is a justiciable one. As noted above, the State is of the position that it retains final authority to make harvestable surplus determinations – that is if the State biologist and the Bands' biologist disagree as to the proper harvestable surplus level for a particular species, the State has the final say. The State agrees that the Bands can seek review of a regulation that it believes is not conservation based. However, the State asserts that when it makes a "conservation based" decision, such as harvestable surplus determinations, that decision is not subject to review by the Court. The Bands reply that any decision made by the State is subject to review, and the burden is on the State to prove a decision is "conservation based." By giving the State the relief it requests, the Bands argue the Court would be giving the State a blank check to make harvestable surplus determinations without basing such decisions, necessarily, on conservation needs. The State responds to this argument defensively, stating there is no basis upon which to be suspicious of

the State's motives in reaching such harvestable surplus determinations.

The Court would first recognize that the State and the Bands have worked together commendably to reach agreement on a number of issues relevant to the Phase II portion of this case. The fact remains, however, that the Bands have been denied their right to exercise their usufructuary rights under the 1837 Treaty for a number of years. Their suspicion, therefore, is understandable.

The State principally relies upon the opinion in *Sohappy v. State of Oregon*, 302 F.Supp. 899 (D.C.Or.1969). At issue in *Sohappy* was the limitation on the state's power to regulate the exercise of the Indians' treaty rights. In *Sohappy*, the state of Oregon argued that it could place any restriction upon the Indians' fishing rights if the same restrictions were placed on non-Indian fishing. *Id.* at 907. The state argued the treaty gave the Indians no rights that were to be given separate recognition or protection or be separately dealt with in the state's regulatory scheme. *Id.* The court determined that the state's narrow interpretation of the Indians' rights under the treaty was not supported by law. *Id.* at 908.

Relying in large part on the opinions of the United States Supreme Court in *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968) and *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942), the court in *Sohappy* recognized that the state has the authority to regulate fishing by non-Indians to achieve a wide variety of management conservation objectives, but that as to regulating the "federal right of Indians to take fish at their usual and accustomed places

it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them." 302 F.Supp. at 908.

> The state may not qualify the federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource. The measure of the legal propriety of a regulation concerning the time and manner of exercising this 'federal right' is, therefore, 'distinct' from the federal constitutional standard concerning the scope of the police power of the State.

Id. The court further defined the parameters of the state's ability to regulate Indian fishing, by stating,

> [i]t is clear that the state has the full and complete power to regulate all kinds of fishing, including the Indian fishery, to the end that the resource is preserved . . . In determining what is an 'appropriate' regulation one must consider the interests to be protected or objective to be served. In the case of regulations affecting Indian treaty fishing rights the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy co-equal with the conservation of fish runs for other users.

Id. at 911. The court refused to prescribe in advance all the details of appropriate and permissible regulation, since "proper anadromous fishery management in a changing environment is not susceptible of rigid predetermination." *Id.* The court also refused, based on the record before it, to prescribe the procedures which the

state must follow in adopting regulations applicable to the Indians.

> The state must recognize that the federal right which the Indians have is distinct from the fishing rights of others over which the state has a broader latitude of regulatory control and that the tribal entities are interested parties to any regulation affecting the treaty fishing right. They, as well as their members to whom the regulations will be directly applicable, are entitled to be heard on the subject and, consistent with the need for dealing with emergency or changing situations on short notice, to be given appropriate notice and opportunity to participate meaningfully in the rulemaking process.

Id. at 912. The court went on to state,

> This does not mean that tribal consent is required for restrictions on the exercise of the treaty rights. As the Supreme Court has stated on several occasions, the state's police power gives it adequate authority to regulate the exercise of the treaty secured Indian off reservation fishing rights, provided its regulations meet the standards which that court has prescribed.
>
> It is not necessary at this time, and it would be inappropriate on this record, to determine the extent, if any, of the authority of the Federal Government or of the intervenor tribes to prescribe regulations that would govern Indians in the exercise of the treaty-secured fishing rights. It is sufficient to say that the state's authority to prescribe restrictions within the limitations imposed by the treaties and directly binding on the Indians is not dependent upon assent of the tribes or of the Secretary of the Interior.

Id. It is the last two quoted paragraphs from the *Sohappy* opinion upon which the State relies in arguing that it retains final authority to make harvestable surplus determinations that are unreviewable by the Court. The Bands respond that they do not take the position that the State needs their consent, but rather argue that if the State imposes that determination upon the Bands, it must be necessary for conservation and can be challenged in court. Read in its proper context, the Court finds that *Sohappy* does not provide the State unreviewable authority to set harvestable surplus determinations.

The State also cites to *Puyallup Tribe*, in which the Court stated,

> The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

Puyallup Tribe, 391 U.S. at 398, 88 S.Ct. at 1728. Thus, *Puyallup Tribe* does not stand for the proposition that the State enjoys unreviewable authority to set harvestable surplus determinations either. The State may regulate harvestable surplus levels, but such determinations should be reviewable in court to ensure such regulation meets the appropriate conservation standards.

Finally, the State argues that Judge Crabb in the *LCO* litigation ruled the state of Wisconsin has final authority to make management decisions. Before the court in *LCO VI, supra,* was the question of the extent, if any, to which

the state of Wisconsin may regulate the bands' exercise of their usufructuary right to harvest walleye and muskellunge within the ceded territory. In making this determination, the court specifically relied on its prior ruling that the state could regulate the exercise of the bands' usufructuary rights only in the interest of conservation and public health and safety and only upon a showing that the regulation is reasonable and necessary for either conservation or health and safety and that it does not discriminate against the Indian harvest. *LCO VI*, 707 F.Supp. at 1037 (*citing, Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 668 F.Supp. 1233 (W.D.Wis.1988) (*LCO IV*)).

Before the court was a specific proposal for regulation by the state of Wisconsin as to the harvesting by the Bands of walleye and muskellunge. The court held that the state of Wisconsin could not regulate the Bands' harvesting of walleye and muskellunge provided the Bands "enact a management plan that provides for the regulation of their members in accordance with biologically sound principles necessary for the conservation of the species being harvested, as set out in this opinion." *LCO VI*, 707 F.Supp. at 1060. One such "biologically sound principle" involved the sharing of biological information between the Bands and the State. The need for the exchange of ch information was explained by the court as follows:

> The fact that plaintiffs may be regulating their members' exercise of their treaty rights does not make them the manager of the fisheries. That responsibility and authority remains the defendants'. They have the fiduciary obligation of

> managing the natural resources within the ceded territory for the benefit of the current and future users. . . . The tribes' regulation of their members does not relieve the department of this obligation or prevent it from carrying it out, although it narrows its management options to a significant degree, and imposes burdens on them beyond those it carried out in the previous implementation of the *Voigt* decision.

Id. Another "biologically sound principle" involved the determination of a safe harvest level. On this issue, the court stated that such determination should be made on the basis of a reliable population estimate, to which is applied an agreed upon exploitation rate and then discounted by a safety factor that is to be determined by the Biological Issues Group (a State-Tribal group of biologists), or "if the group fails to reach agreement on that factor, to be provided by the Department of Natural Resources." *Id.* at 1059. The court does not go on to say that such determination by the Department of Natural Resources as to the applicable safety factor is not subject to judicial review. Read in context with its prior opinions, the court in *LCO VI* did not grant the state of Wisconsin the authority to make harvestable surplus determinations that are immune from judicial review.

In its motion for summary judgment on the harvestable surplus issue, the Bands ask the Court to enter an order requiring 1) the parties to attempt to reach consensus on harvestable surplus determinations, in accordance with the Protocols; and 2) if, after exhausting the non-judicial dispute resolution processes in the Protocols the parties cannot reach consensus on such matters, either party to ask the Court to resolve the disputes.

Based on the above, the Court finds that the Bands' position as to harvestable surplus determinations, that such determinations are subject to judicial review, is consistent with the applicable case law. Summary judgment is therefore appropriate in favor of the Bands on the issue of harvestable surplus determinations.

3. Boundary Lakes

The State asserts that the Minnesota portion of the Ceded Territory bisects twenty-two (22) lakes, the largest being Lake Mille Lacs. The State argues that the portions of the lakes outside the Ceded Territory is not available for the exercise of the rights granted in the 1837 Treaty. Accordingly, the State argues that the allocation formula for harvestable fish must recognize a proportional reduction to reflect the proportion of lakes excluded. The State argues its position is supported by the language of the 1837 Treaty, which provides the Bands "the privilege of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States . . . " Article 5, 1837 Treaty. The State also notes that in the Stipulations, the Bands have agreed that the harvestable surplus levels for wildlife shall be calculated for the portion of the harvest unit within the Ceded Territory on the basis of the percentage of the harvest unit's total acreage within the ceded territory, and that the State simply asks that the same be done for the lakes.[3]

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[3] See also the Landowners' Fourth Motion for Summary Judgment.

The Bands respond that their treaty rights extend to all waters "in and abutting the ceded territory" as stated by the court in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F.Supp. 1420, 1426 (W.D.Wis.1987) (*LCO III*) and reaffirmed in *LCO VI*, 707 F.Supp. at 1037. The Bands argue the State has not submitted any authority for its argument, and that case law in fact is contrary to such position.

As previously held by this Court in *Mille Lacs II*, the first rule of construction applicable to the interpretation of Indian treaties requires the treaty language be construed as the Indians understood them, "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Id.* at 822 (*quoting, Washington et al. v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76, 99 S.Ct. 3055, 3069-70, 61 L.Ed.2d 823 (1979) (*Passenger Fishing Vessel*)). The second rule of construction requires that ambiguous terms be construed in favor of the Indians, "particularly if the language could easily be interpreted in favor of the Indians or the United States . . . " *Id.* Together, the canons of construction applicable to the interpretation of Indian treaties requires "a liberal interpretation in favor of Indians." *Id.*

Applying these canons of construction to Article 5 of the 1837 Treaty, the Court finds that the Bands would not have understood that they could not fish on the portion of a boundary lake which lies outside of the Ceded Territory. As noted by the Michigan Supreme Court in *People v. Jondreau*, 384 Mich. 539, 185 N.W.2d 375, 378 (1971):

> The Indians did not have knowledge of the laws concerning municipal boundaries or sovereignty disputes between the Federal and State governments. Since they were living on land bordering the Keweenaw Bay, as 'an unlettered people' they would assume that the right to fish meant the right to fish on the Keweenaw Bay.

Similarly, with respect to the boundary lakes at issue here, the Chippewa would assume that they could fish on any portion of the lake, not just on part of the lake. The court in *LCO III* specifically found that this was the understanding of the Chippewa when they agreed to the treaties of 1837 and 1842. *LCO III*, 653 F.Supp. at 1426 (they understood they were guaranteed the right to make a moderate standard of living off the land and the waters in and abutting the ceded territory).

The treaty guarantees the right to fish "in the rivers and the lakes included in the territory ceded." On the issue as to whether the Ceded Territory includes only the portion of a boundary lake located inside the boundary or the whole lake, the treaty language is ambiguous. Arguably, the treaty language supports both positions. Applying the second canon of construction applicable to Indian treaties, ambiguities are to be construed in favor of the Indians. Thus, the Bands are free to exercise their rights on those parts of the boundary lakes which lie outside of the Ceded Territory.

Because the Court finds that the 1837 Treaty rights extend to waters "in and abutting" the Ceded Territory, there is no merit to the State's claim that the harvestable surplus calculations for boundary lakes must be reduced on the basis of the percentage of lake outside the Ceded

Territory. Summary judgment in favor of the Bands is appropriate on this issue.

4. Private Lands

Both the State and the Bands seek a definition of "private lands" upon which the Bands can exercise their usufructuary rights under the 1837 Treaty.[4] The State argues that in *Mille Lacs II*, the Court's use of the phrase "private lands open to public hunting, fishing and gathering" restricted the exercise of treaty rights on private lands to those private lands opened to the general public for hunting, fishing and gathering by operation of state law, such as the Minnesota tree growth tax law which creates right of public access in exchange for granting favorable tax treatment to lands. The State argues that such definition does not include private lands to which the owner grants permission to hunt and fish to certain individuals or groups. The State asserts its position is consistent with the holdings in the *LCO* litigation and by prior orders of this Court.

The Bands argue that *Mille Lacs II* stands for the proposition that the 1837 Treaty did not provide a right of access, therefore the usufructuary rights cannot be exercised on land to which the Band members would not have access. However, by receiving the consent of a landowner, such Band member would be given access and could therefore exercise their rights on such land.

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[4] See also the Landowners' Sixth Motion for Summary Judgment.

In *Mille Lacs II*, the Court noted that the Bands were not seeking access to private lands. 861 F.Supp. at 789. In a footnote, the Court added:

> Plaintiffs concede that the 1837 Treaty did not provide any special right of access and that the rights they seek to have recognized "may be exercised only on those lands and waters, public or private, to which Band members have access under generally applicable law." Joint Proposed Findings of Fact and Conclusions of Law at 92-93.

Id., 789 n. 2. Later on in the opinion, Judge Murphy addressed the Landowner's argument that the usufructuary rights were terminated by land patents issued by the government. *Id.* at 835. The Court ruled that the issuance of land patents did not extinguish the usufructuary rights at issue, but nonetheless held that

> exercise of the 1837 usufructuary rights should be limited to lands in the ceded territory that are not privately owned because no right of access was included in the privilege. In this sense, privately owned lands do not include public lands formerly in private ownership or private lands open to public hunting, fishing and gathering.

Id., at 836 (*citing, LCO III*, 653 F.Supp. at 1432, *see infra*, pp. 834-835. *See also Kimball v. Callahan*, 493 F.2d 564, 566-69 (9th Cir.) *cert. denied*, 419 U.S. 1019, 95 S.Ct. 491, 42 L.Ed.2d 292 (1974)). The meaning of the phrase "private lands open to public hunting, fishing and gathering", can be determined by examining the cases cited in support thereof.

Judge Murphy first cites to the *LCO* opinion of Judge Doyle, which states the following:

> A specific definition of privately owned lands was not articulated by the court of appeals in *LCO I [Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir.1983)] and *LCO II*. I declare the term to mean lands that are privately owned as of the time Chippewa exercise of usufructuary rights is contemplated or carried on. The lands are not "privately owned" if they were privately owned at some earlier time, but are no longer so owned. Also, if the owners of privately owned lands have made provision for hunting, fishing and gathering by the public generally – rather than for such activity only by limited persons or groups specifically designated by the owners – the Chippewa can exercise their usufructuary rights.

LCO III, 653 F.Supp. at 1432. Judge Murphy then cites to the prior discussion in her opinion addressing the issue of whether the language used in the 1837 Treaty created a *profit a prendre*[5] that was an interest in land extinguished by the 1855 Treaty or a license extinguished by subsequent sale of land. In finding the usufructuary rights were neither a *profit a prendre* or a license, Judge Murphy relied on the expert testimony of Dr. Thomas Lund. *Mille Lacs II*, at 834. Dr. Lund had testified that the 1837 Treaty

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[5] *Profit a Prendre* is defined as a right exercised by one in the soil of another, accompanied with participation in the profits of the soil thereof. Blacks Law Dictionary, p. 1376. This right includes the conveyance of hunting and fishing rights by property owners and the right to enter land for that purpose. *Mille Lacs II*, at 834. *Profit a Prendre* is considered to be an interest in land.

conveyed a privilege to hunt or fish if the takers could reach the land without committing a trespass. *Id.* Dr. Lund also testified that the drafters of the 1837 Treaty would not have considered the usufructuary privileges to be a right, title or interest in land. *Id.* Judge Murphy found that Dr. Lund's testimony was consistent with nineteenth century law. *Id.*

Judge Murphy then went on to discuss the American common law rule that the sovereign owns fish and game in trust for its citizens, and that a landowner can only convey the right to hunt and fish game on his/her land by granting the right to enter the land for that purpose. *Id.* Judge Murphy went on to note that as a sovereign, the United States could, however, convey its ability to regulate the taking of the wildlife it owns, and that the similar right was conveyed in the 1837 Treaty.

> In the nineteenth century the public was allowed to hunt, fish, and gather on all lands not developed, enclosed or posted. An abundant amount of land was open for these purposes, and the drafters of the 1837 Treaty would not have focused on whether the Chippewa would have access to land to hunt, fish, and gather. The 1837 Treaty does not mention access or entry. It seems unlikely that the United States would have given the Chippewa an implied right of access to the 1837 ceded territory because such right could have eventually prevented certain uses of the ceded territory.

Id. Judge Murphy also determined that the evidence in the record did not support a finding that the Chippewa understood their usufructuary rights would be subject to automatic termination whenever a portion of the Ceded

Territory was transferred by the federal government. *Id.*, at 835. "There is no evidence that the Chippewa understood that the usufructuary privilege would be terminated whenever land was surveyed and sold. They understood that it would only be terminated by the President in good faith." *Id.*

Finally, Judge Murphy cited the Kimball decision to support the determination that the usufructuary rights can only be exercised on private lands open to the public for hunting, fishing and gathering. In that case, the Ninth Circuit declared that plaintiffs could exercise their treaty rights to hunt and fish "on the lands constituting their ancestral Klamath Indian Reservation, including that land now constituting United States national forest land and that privately owned land on which hunting, trapping or fishing is permitted." *Kimball,* 493 F.2d at 570. The court also noted that the plaintiffs did not seek rights against private landowners, because they recognized those persons might properly exclude Klamaths and anyone else from hunting or fishing. *Id.* at 569. In a footnote, the court stated it was not making any determination as to the treaty rights of the Indians as against private landowners. *Id.* at 569 n. 10.

The Bands argue that read together, the above case law supports its position that "private lands open to public hunting, fishing, and gathering" i. cludes private lands that are undeveloped, non-agricultural and non-posted lands, which, according to statute, are open to the public for hunting. Minn.Stat. § 97B.001 provides that any person may hunt on private land that is not agricultural land, Section 97B.001, Subd. 1, and that is not posted, Section 97B.001, Subd. 4, if such person has not been

notified orally that they may not enter the land by the owner, occupant or lessee of the private land. Section 97B.001, Subd. 3. The case law does support this position, to a certain extent. Pursuant to Section 97B.001, any member of the public, Indian and non-Indian, may enter non-agricultural and non-posted land for the purpose of hunting. However, the owner, occupant or lessee of such private land could conceivably discriminate against the Indians or the non-Indians by giving oral notice that such persons cannot enter the land to hunt. The State asserts the distinction between private lands open to the public generally and indiscriminately and private lands to which owner consent is necessary is crucial. Private lands open to the public generally carry a statutory right of access, while private lands to which consent must be obtained carries no right of access for the general public. The State also asserts that the LCO court and Judge Murphy held the right to exercise the usufructuary rights coexisted with a right of access protected by state law, not at the discretion of landowners.

Although not relied upon by Judge Murphy in making her determination as to which private lands may be utilized by the Bands to exercise their usufructuary rights, the specific issue of whether such rights could be exercised on private lands with owner consent was addressed in *Lac Courte Oreilles Band v. Wisconsin,* 740 F.Supp. 1400, 1420 (W.D.Wis.1990) (*LCO VII*). The state of Wisconsin opposed the contention that the Band members could exercise their rights on private lands with owner consent, asserting the issue of consent is legally gratuitous:

> recognizing on one hand that if the treaty right extends to private lands it is unnecessary for the tribes to secure the consent of the owners, and on the other, that if plaintiffs' rights do not extend to private lands the tribes cannot relieve themselves of the obligation to obey state hunting regulations simply by reaching an agreement with a property owner to hunt on private lands.

Id. The court agreed with the position of the state of Wisconsin.

> If plaintiffs have a right to hunt on private lands, they cannot be limited to hunting on only those private lands whose owners consent. Defendants are correct in maintaining that the issue of consent is a red herring: the issue is whether the plaintiffs may exercise their usufructuary rights on private lands within the ceded territory. In my view, that opportunity is foreclosed to plaintiffs at the present time. The decisions of the court of appeals in LCO I, 700 F.2d 341 and LCO II, 760 F.2d 177, have established that plaintiffs' rights have been extinguished on private lands. I have held that plaintiffs are not entitled to all of the resources necessary to provide them with a moderate standard of living. Plaintiffs are entitled to an equal share of all of the resources within the ceded territory, but they may harvest those resources only from public lands. It may be in the future that they can prove not only that they have the need to take the full half of the resources to which they are entitled but that they have the capacity as well and that they cannot harvest their share without gaining access to private lands. In that event it may be

> necessary to take appropriate measure for Chippewa activity on privately owned lands, as Judge Doyle suggested. It may be that hunting by consent is one of those measures. I express no view on that point.

Id.

After a careful analysis of all the cases cited by the parties on this issue, the Court finds that at this time, the better construction of which private lands are available for the exercise of the 1837 Treaty rights is that proposed by the State. Although the *LCO VII* decision of Judge Crabb is the only decision which specifically addresses the issue, the Court finds that the essence of the cases cited by the parties supports a finding that the treaty rights at issue in this litigation may only be exercised on lands, public or private, open to the general public for hunting, fishing and gathering by operation of state law.

As noted by the State, allowing the exercise of the usufructuary rights by owner consent would potentially provide individual Band members more rights than other Band members. The rights granted under the 1837 Treaty are rights granted to the Bands, not to individual members. Furthermore, given the fact that a private landowner could discriminate as to who would be allowed to hunt, fish or gather on his/her land would create potential problems in law enforcement. A conservation officer would have the undue burden of having to contact private land owners to determine if consent was provided to certain individuals before being able to determine whether laws were violated.

It may be, as pointed out by Judges Doyle and Crabb in the *LCO* litigation, that it will be necessary at some point in the future to address this issue again if the Bands can show that they cannot harvest their share without gaining access to private lands. However, as the Bands have not, as yet, been able to exercise their usufructuary rights there is no evidence before the Court that they will not be able to harvest their share only on public lands.

Based on the above, summary judgment is appropriate for the State as to the definition of "private lands" upon which usufructuary rights may be exercised.

5. Shining Deer in December

The Bands have developed a comprehensive set of regulations to provide limited opportunity for band members to hunt deer at night with the aid of lights, over bait, from the day after Labor Day to December 31. Band Code Section 6.20. The State argues that Minn.Stat. §§ 97B.081, 97B.311 and related Minnesota Rules 6232.0300 and 6232.1300 should remain applicable to Band members arguing it is necessary for conservation to prohibit the shining of deer, over bait in December. The State argues that shining deer over bait is such an effective method of hunting and the Band members use of such method may thwart the State's careful management of deer through its harvest management unit system.

The State manages its deer resource through a system of designated harvest management units. This method is used because it takes into consideration different habitats, human development pressure, land ownership and

use patterns and climate conditions. There are 121 anterless deer permit areas in the State, fifteen of which fall within the Minnesota Ceded Territory. The State distributes and records deer hunting tags by these units to allow for more control of hunting efforts in the different parts of the State. The State allows hunters to remove anterless deer within the permit units in numbers that correspond to the population management goals and harvestable surplus calculations for the particular permit unit. The State currently makes its calculations based on summer/fall distribution of deer.

The concern here is that during the winter months, deer begin to move and migrate seeking better shelter and/or accessible food sources. The winter migration may cause deer to move many miles, from one permit unit to another, or it may cause deer to concentrate in one spot within a unit. Once the deer have concentrated, the State is concerned that the use of the efficient harvest method of shining over bait could lead to deer being harvested in disproportionate numbers from what was predicted by the biologists, leading to potential over harvest of deer in certain parts of the Minnesota Ceded Territory.

The Bands first assert that the statutes and rules upon which the State relies to prohibit shining, over bait, in December are over broad. Minn.Stat. § 97B.081 prohibits all shining of deer. Minn.Stat. § 97B.311 merely vests authority in the State Commissioner to prescribe areas and seasons in which deer may be taken. Minn.Rule 6232.0300, Subpart 4 prohibits the use of bait and Minn.Rule 6232.1300 prescribes seasons for taking deer by firearms, the application of which would eliminate

most of their firearms deer season. The State concedes that these statutes and rules would not be enforced beyond the extent of prohibiting the shining of deer over bait in December. Accordingly, the Bands are entitled, at a minimum, to a declaration of the Court that such statutes and regulations are inapplicable to Band members except when hunting deer with lights over bait in December.

The Bands argue they are nonetheless entitled to summary judgment as to deer shining over bait in December as the State has failed to show that such regulation of this harvest method is necessary for conservation, as that term is defined in the context of Indian Treaty rights.

Judge Murphy previously held that before the State can regulate the exercise of the usufructuary privileges the State must show that such "regulation is a reasonable and necessary conservation measure and that its application is necessary in the interest of conservation." *Mille Lacs II*, 861 F.Supp. at 838. Case law supports the position of the Bands that "conservation" as that term is used in the context of Indian treaty rights, should be interpreted more narrowly than in other contexts. In *United States v. Washington*, 384 F.Supp. 312, 342 (W.D.Wash.1974) *aff'd* 520 F.2d 676 (9th Cir.1975) *cert. denied*, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976), the district court determined that Indian treaty rights are "rights which are made the supreme law of the land by the federal constitution." Thus, the state's power to regulate such rights must be interpreted narrowly and sparingly. *Id.* "Every regulation of treaty right fishing must be strictly limited to specific measures which before becoming effective have been established by the state, either to the satisfaction of

all affected tribes or upon hearing by or under direction of this court, to be reasonable and necessary to prevent demonstrable harm to the actual conservation of fish." *Id.* The court went on to state that "[h]owever broadly the word may be used and applied in the theory and practice of fisheries science and management, 'conservation' as used in Supreme Court decisions and herein is limited to those measures which are reasonable and necessary to the perpetuation of a particular run or species of fish." *Id.* In affirming the district court, the Ninth Circuit held that although a state program to manage its fisheries may appear sound and commendable, the state must recognize that it shares its rights in those fisheries with the Indians.

> It may not force treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens. The state must pursue its goals as best it can by regulating its own non-treaty Indian citizens. The state may secure treaty Indians' compliance with these regulations only by gaining their acquiescence in its goals. Direct regulation of treaty Indian fishing in the interest of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power.

United States v. Washington, 520 F.2d 676, 686 (9th Cir.1975) *cert. denied* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976) (*citing*, *Antoine v. Washington*, 420 U.S. 194, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975)). In *United States v. Oregon*, 718 F.2d 299, 305 (9th Cir.1983), the term "conservation" as used in the context of treaty usufructuary

rights, was further defined to include measures designed to ensure a reasonable margin of safety against extinction.

> We can easily foresee instances in which limitations on the geographical aspect would be proper under the treaty even though extinction of the rights as a species was not imminent. Conservation, properly understood, embraces procedures and practices designed to forestall the imminence of extinction. Preserving a "reasonable margin of safety" between an existing level of stock and the imminence of extinction is the heart and soul of conservation. Limitations on the geographic aspect of the tribes' treaty rights to promote that end are permissible.

Id. Limiting the taking of a species or resource in a particular geographic area may also be permissible, if it is reasonable and necessary in the interests of conservation. *LCO IV*, 668 F.Supp. at 1236 (*citing, Sohappy*, 302 F.Supp. at 908). A conservation measure is reasonable if it is "appropriate to its purpose." *Id.* (*citing, United States v. Washington*, 384 F.Supp. at 342). A conservation measure "is necessary if it is 'essential to conservation.' " *Id.* The regulation may not be imposed if the Band can effectively self-regulate and such tribal regulations are sufficient to meet conservation needs. *Mille Lacs II*, 861 F.Supp. at 839.

The Bands submit that they have agreed to manage their own deer harvests by setting quotas in each of the State's permit units and closing the unit to further hunting of anterless deer once the quota has been taken. The Bands have further agreed that their quotas will not exceed 50% of the harvestable surplus in any permit unit, but that their total quota will not exceed 900 deer in the Ceded Territory for the first five years of harvest, which

total represents only 7 to 11% of the annual harvest in the Ceded territory in recent years. The Bands further argue that the State has failed to submit any evidence that the prohibition of shining deer over bait in December is needed for conservation purposes in light of the Bands' Management Plan and Code. The Bands assert that the State's concern about this harvest method is only about conservation of local concentrations of deer and the general distribution of deer in the Ceded Territory.

To support their position, the Bands have pointed out that the State's expert reports and deposition testimony confirm that the State's interest does not meet the conservation standard. The Bands point to the report of the State's experts Jay McAninch and David R. Schad in which they state that the State's population goals for various management units is based on the management objectives of "prevent[ing] abundant populations from causing excessive agricultural crop damage or deer-vehicle accidents, and scarce populations where people are not able to view or hunt deer as successfully as they would like. The permit areas are used to prevent localized depletion or excessive expansion of deer populations." McAninch and Schad Report at 16. The Bands also point to the deposition testimony of Mr. Schad, in which he conceded that various management objectives, such as a biologist's desire to see more deer in an area, to a hunter's desire to kill a lot of deer, to the public's desire to see a lot of deer, could be taken into consideration in setting a population goal for a particular harvest unit. Schad Dep. at 64-65. The Bands also point to the deposition testimony of Mr. McAninch, in which he stated the "the ultimate goal of all these is to maintain that goal

density, and the goal density is predicated on a set of deer conditions and relations with landowners and all those kinds of things." McAninch Dep. at 157. More importantly, Mr. McAninch agreed that localized harvest does not resemble extinction over the entire unit, as deer will replenish and reoccupy the area from where the animals are removed. McAninch Dep. at 156. The Bands assert that based on the above, the State cannot meet its burden to show shining deer over bait in December is necessary to preserve the deer population in even a particular management unit.

The State responds that a permissible conservation measure may be implemented in a specific geographic region, that it need not be measured across the entire Ceded Territory. The State further points out that at his deposition, the Bands' expert, Jonathan Gilbert, acknowledged that avoiding harvest of winter-stressed deer is a valid concern, which is why the Band chose to limit its season to December 31. Gilbert further testified, however, that there was little evidence to show deer are winter-stressed prior to December 31. The State responds that its experts can point to ample evidence that deer become winter-stressed prior to December 31. Thus, there is a genuine issue of material fact as to when deer become winter-stressed, which requires summary judgment be denied. The State also argues that the Bands' definition of "conservation" is too narrow and illogical, for it would allow hunting to the extent that the species is down to the bare minimum of animals necessary to survive. The State would ask that the Bands submit evidence as to why the State's biologists are mistaken about the need for a

restriction on shining deer and that such matter should be determined after trial.

The Court finds that although the Bands' expert concedes the harvesting of winter-stressed deer is a valid concern, such fact does not create a genuine issue of material fact which precludes summary judgment. The Court has thoroughly reviewed the expert reports and expert deposition testimony and finds that the State has failed to meet its burden of establishing a genuine issue of material fact exists that its regulations to prohibit the shining of all deer over bait in December by Band members is necessary for conservation. As the case law reveals, the State's power to regulate Indian treaty rights is very narrow. And although the State may have commendable and sound reasons for its proposed regulations, it is nonetheless constrained by the rights of the Bands' treaty rights. Thus, the State must put forth specific evidence establishing why the regulation is a measure "to forestall the imminence of extinction." *United States v. Oregon*, 718 F.2d at 305. The record before the Court establishes that the State has many management objectives that are taken into consideration when setting population goals within its permit areas, which include recreational as well as biological concerns. McAninch Dep. at 184. Thus, the evidence does not support the State's assertion that its concern is based solely on the perpetuation of the deer, rather than its various other management objectives, such as recreational concerns, i.e. hunting or public viewing. And as pointed out by the Bands, Mr. McAninch testified at his deposition that the elimination of deer in a local unit would not translate into

extinction as deer would naturally reoccupy a depleted area over a short time.

Even if the State established that some regulation of deer shining over bait in December was necessary for conservation, the State has failed to put forth evidence that the complete prohibition is necessary for conservation, taking into consideration the Bands' agreement to limit its harvest to a total harvest of 900 anterless deer in the Ceded Territory.

Finally, the Bands argue, and the Court agrees, that even if the Court were to find the State's showing was sufficient to create a genuine issue of material fact as to whether the prohibition of deer shining over bait in December is needed for conservation, it would nonetheless be entitled to summary judgment as the Bands have shown such prohibition is not the least restrictive alternative to meet its conservation objectives. The Bands assert that its expert, Mr. Gilbert, states that less restrictive means are available to address the State's concerns, such as limiting shining over bait in December to antlered deer, a prohibition in areas of high deer concentration or managed on the basis of the State's proposed study of deer movements. Gilbert Aff. at ¶ 25. The Bands also assert that the State's own experts made it plain that they did not attempt to develop less restrictive means to address their concerns. *See* Schad Dep. at 19, 23-24, 78-79; McAninch Dep. at 186-187. The Bands assert, and the Court concurs, that the State did not submit any evidence to dispute the assertion that less restrictive means are available. Thus, the State has failed to meet its burden on summary judgment to show a genuine issue of fact exists that less restrictive means are available.

Based on the above, the Court finds that summary judgment in favor of the Bands is appropriate. Accordingly, Minn.Stat. §§ 97B.081, 97B.311 and Minn.Rules 6232.0300 and 6232.1300 cannot be applied to Band members exercising their treaty rights pursuant to Band regulation, as provided in the Stipulations and their attachments.

6. Regulation to prohibit use of gillnets in lakes under 1,000 acres

The Bands have also moved for summary judgment on the issue of whether the State can regulate their treaty rights by prohibiting all use of gillnets in lakes that are under 1,000 acres. Based on the expert reports of Dr. Charles Anderson and Dennis Schupp, the State asserts that a prohibition of the use of gillnets in lakes under 1,000 is necessary for conservation purposes. The State argues, however, that the deposition testimony and expert reports on this issue raise genuine issues of material fact which would render summary judgment inappropriate. The Bands respond that the State's experts do not establish that this prohibition is necessary for conservation and that summary judgment is appropriate.

The State's concern regarding the use of gillnetting in lakes under 1,000 is twofold: gillnetting is an effective fishing method and may result in a removal of a large fraction of fish from a lake in one lift (the effectiveness of a gillnet is referred to as its "catchability"); or one lift may remove a small number of one species of fish, and incidentally remove a large amount of another species (referred to as "bycatch"). Anderson and Schupp Aff. at

¶ 5. The State's experts assert that the increase in gillnet catchability in smaller lakes makes it difficult to predict the amount of fish that may be taken by each net, and that such unpredictability could result in an unintentional over harvest. Anderson and Schupp Aff. at ¶¶ 7 and 9. As with catchability, the bycatch of nontargeted species is higher in smaller lakes. Anderson/Schupp Rebuttal Report at 11.

The Bands do not dispute that gillnetting in smaller lakes poses conservation concerns. The Bands argue, however, that a complete prohibition of gillnetting in lakes under 1,000 acres is not necessary for conservation. The Bands first point out that there are over 100 lakes in the Minnesota Ceded Territory that are between 100 and 1,000 acres and that the Band's Management Plan and Code provides for gillnetting in only eight of those lakes. Moreover, the Band's Management Plan and Code requires a quota based on a lake survey before gillnet fishing can take place on such lake, and restricts the amount of gillnets that can be used based on the quota. Hoenig and Myers Report at 32. The Bands have also imposed restrictions on the size of gillnet mesh that can be used to be protective of the resource and that the surveys required to set the quotas and the data generated from Band fishing would generate a large amount of information to allow for further assessment of resources. *Id.* The Bands assert that their self-regulation addresses the conservation concerns of the State, therefore the State cannot impose its regulations on the Bands treaty rights in this regard.

The Bands also argue that they are entitled to summary judgment on this issue because the complete prohibition of gillnetting on lakes under 1,000 acres is not the least restrictive measure to meet its conservation concerns. The Bands first point to the deposition testimony of one of the State's experts, Dennis Schupp.

> Q: Do you think you could come up with any examples where it was sufficiently limited that it wouldn't present a conservation concern?
>
> A: Yeah. I think from our catchability model we could probably make some judgment on where – what that level might be.
>
> Q: And has there been any attempt to do that?
>
> A: There hasn't, but it could be done.

Schupp Dep. at 62-63. The Bands assert that this unrebutted testimony establishes that there is some level of gillnetting on smaller lakes that do not pose a conservation concern, and that such limit can be determined by the State's current catchability model. Further, the Bands assert that the deposition testimony of Mr. Schupp establishes that the State's concern regarding bycatch, the netting of non-targeted species, does not justify the 1,000 acre limit.

> Q: Well, the State's position is that the Bands should be prohibited from gillnetting in lakes less than 1,000 acres; is that correct?
>
> A: Yes.
>
> Q: And one of the rationales for that is that bycatch increases with decreasing lake size; is that correct?

A: Uh-Huh.

Q: Okay. In terms of that particular rationale, how did you – how does that support 1,000 as opposed to 800 or 600 acres?

A: This come back to our catchability model that – and refers to walleye. The thousand acres is based only on catchability of walleye.

Q: Okay. So that concern about the increase in bycatch with decreasing lake size wasn't the basis for the thousand acre limitation?

A: No.

Schupp Dep. at 59-60. The State responds that Mr. Schupp clarified in his Affidavit that bycatch is an underlying concern, but that the bycatch concern is not the basis for the 1,000 acre limitation. The Bands point out, however, that it is the State's burden to prove its regulation is the least restrictive measure to address its conservation concerns, and that the bycatch concern does not support the 1,000 limitation. Finally, the Bands argue that the State's use of gillnetting on these smaller lakes for survey purposes demonstrates that a complete prohibition of gillnetting on smaller lakes is not necessary for conservation purposes.

The State points out that gillnetting on lakes under 1,000 acres is not allowed in Wisconsin. In *LCO VI*, *supra*, the court held that the State successfully established that the prohibition of gillnetting on all lakes under 1,000 acres was necessary for conservation.

> Defendants have never contended, and there is no basis for finding, that either the muskellunge

> or the walleye is in danger of extinction from the ceded territory if plaintiffs' rights are not restricted. They have shown, however, that unrestricted fishing could cause the collapse or even the extirpation of the stock of a particular lake, with the consequence that the lake might never again sustain such a stock. This legitimate concern merits consideration. Defendants need not show that a particular rule or regulation is necessary to preserve the entire species from extinction within the ceded territory; they need show only that the measure is necessary to preserve the stocks in the majority of the walleye and muskellunge lakes. *See, Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44, 49, [94 S.Ct. 330, 333-34, 38 L.Ed.2d 254] (1973).

LCO VI, 707 F.Supp. at 1056. As noted by the Bands, they do not seek the unrestricted right to gillnet on all lakes under 1,000 acres. They only seek to exercise such right on eight out of over 100 such lakes, ranging in size from 110 acres to approximately 696 acres. Furthermore, the Bands have agreed to a number of restrictions on gillnetting in these lakes to address the conservation concerns raised by the State, another factual distinction from the record before the court in *LCO VI*.

The State asserts that the Court needs to evaluate the potential risk of gillnetting on all the lakes under 1,000, because a legal determination that there is no conservation concern on a smaller lake may cause the Bands to amend their Code in the future to permit gillnetting in more lakes, and the State will have lost its ability to raise a valid conservation concern. The State's position is not supported by the law.

Again, the State may regulate Indian Treaty rights in the interests of conservation, if such regulation meets the appropriate standards and does not discriminate against the Indians. However, even if the State regulation meets the appropriate standards and is not discriminatory, the State is nonetheless barred from regulating the Indian treaty rights if the Bands can effectively self-regulate and the tribal regulations are adequate to meet conservation needs. Such determination is, by definition, fact specific. Thus, ruling that gillnetting on eight lakes under 1,000 acres meets the State's conservation interests would not preclude the Court from revisiting the issue if the Bands moved to amend their Code to allow gillnetting in all the lakes under 1,000 acres.

The Court agrees that the record before it is distinguishable from the record before the Wisconsin court in *LCO VI*. The Bands only seek to gillnet in a small percentage of the available lakes under 1,000 acres in the Minnesota Ceded Territory. As noted by the court in *LCO VI*, the State "need show only that the measure is necessary to preserve the stocks in the majority of the walleye and muskellunge lakes." 707 F.Supp. at 1056. The State cannot meet this burden, however, because the Bands only seek to gillnet on eight lakes under 1,000 acres. *Id.* Furthermore, the Bands have imposed many restrictions on Band members' ability to gillnet in these lakes, in order to address the State's concerns. The State has not met its burden of establishing a genuine issue of material fact exists that such Band regulations do not meet its conservation concerns. The Court also finds that the Bands have shown that a complete prohibition of gillnetting on lakes under 1,000 acres is not the least restrictive measure to

address its conservation concerns. Accordingly, summary judgment in favor of the Bands is appropriate.

The Court is not declaring that all gillnetting on smaller lakes by the Bands is permissible. The Court is simply holding that at this time, the Bands may gillnet on those lakes identified in its Management Plan and Code, subject to the restrictions contained therein.

II. Motion for Entry of Final Judgment or alternatively, Preliminary Injunction

The Bands request that in the event its motion for summary judgment as to regulatory issues is granted in its entirety, that the Court enter an Order incorporating the terms of the Stipulation, which would allow Band members to immediately begin exercising their usufructuary rights. The State agrees that if the Court grants Plaintiffs' motion for summary judgment on the regulatory issues, entry of final judgment is appropriate.

Because summary judgment has been granted to the Bands on all regulatory issues, the motion for entry of final judgment is granted.[6]

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[6] The Landowners have filed a motion to dismiss the Bands' claim for injunctive relief on the basis that an adequate remedy exists at law. The Landowner's argue that money damages are the appropriate remedy. As conceded by the State in its motion in opposition to the Bands' motion for entry of a final order or preliminary injunction at page 2, injunctive relief is the appropriate remedy in treaty rights cases given the unique nature of the rights and the inability to quantify damages. *United States v. Washington*, 384 F.Supp. 312, 404 (W.D.Wash.1974). Injunctive relief has been repeatedly granted

III. Motions for Summary Judgment on Resource Allocation

The Bands move the Court for summary judgment as to resource allocation issues. The Counties and Landowners have also filed motions for summary judgment concerning allocation issues. *See*, Counties' Motion for Summary Judgment re: Moderate Living, and Landowner's Cross motions One through Four.

By its motion, the Bands move for summary judgment on the following issues: 1) that there is no basis for an allocation on the present record; or 2) if the Court deems an allocation is necessary, it should be an equal allocation, with the ceiling on the Band's harvest set at 50% of the harvestable surplus of the resource in question. The United States has submitted a memorandum fully supporting the position of the Bands.

The Bands argue that allocation of resources is appropriate only upon a threshold showing that allocation is necessary to protect the Indians' treaty right to harvest or to prevent the Indians' harvest from exhausting the resource and thereby depriving non-Indians of harvest opportunities. The Bands further argue that in the absence of a showing of need, courts have declined to

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in treaty rights cases. *See, e.g., United States v. Washington*, 384 F.Supp. at 405; *United States v. Washington*, 459 F.Supp. 1020 (W.D.Wash.1978) *aff'd*, 645 F.2d 749 (9th Cir.1981); *Washington v. Passenger Fishing Vessel*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979); *United States v. Oregon*, 769 F.2d 1410 (9th Cir.1985); *Lac Courte Oreilles Band v. Wisconsin*, 775 F.Supp. 321 (W.D.Wis.1991). The Landowners' motion to dismiss the claim for injunctive relief must be denied.

allocate resources between the Indian and Non-Indian harvesters. Because it is the defendants who seek an allocation, the Bands also assert that the burden is on the defendants to show such allocation is necessary.

The State opposes the Bands' motion for summary judgment on allocation issues, asserting genuine issues of material fact exist which warrants a trial. The Counties and the Landowners argue they are entitled to summary judgment on the allocation resource issues. The defendants all rely on similar arguments in support of their positions. First, the defendants assert that the Bands' analysis of the allocation issues is flawed. It is their position that the central and prerequisite issues to allocation are determining the monetary measurement of a moderate standard of living and whether the Bands have achieved that level. Such a determination must be made because whether or not the Bands have achieved a moderate standard of living directly dictates what portion of the harvestable surplus of a resource to which the Bands are entitled. For example, if the Bands prove they have not achieved a moderate standard of living, the Court must determine what percentage of the harvestable surplus will bring the Bands to the level of a moderate standard of living. However, if the Bands have achieved a moderate standard of living, they are only entitled to that percentage of the harvestable surplus that will meet their ceremonial or religious needs. The defendants also assert that in determining the moderate standard of living, all sources of income are taken into consideration, not just whether the Bands can reach a moderate standard of living solely through the exercise of its usufructuary

rights. The defendants contend that the burden of establishing these issues is on the Bands. Finally, the defendants assert the necessary showing for the need to allocate resources has been made.

A. Is Allocation Necessary.

The Bands first assert that neither they, nor the United States, are seeking an allocation of the resources available for harvest under the 1837 Treaty. Instead, the Bands have developed management plans to allow for the gradual development of treaty harvests. In light of these plans, the Bands assert there is no need to allocate the resources between Indian and non-Indian harvesters. The Bands have taken the position that the 1837 Treaty provides them a non-exclusive right to the harvestable resources in the Minnesota Ceded Territory, not an unlimited right. Therefore, the Bands acknowledge that non-Indian harvesters have a right to a fair share of the resources. However, given the fact that the Bands' Management Plan and Code restricts the Bands' harvest well below an equal share of the available harvest, the defendants cannot show the Bands' harvest would impinge on the non-Indians' right to a fair share.

The Bands argue that allocation is a form of equitable relief, and that such relief should not be granted absent a compelling need to do so. In support of its position, the Bands cite the Court to cases involving the equitable apportionment of water, fish and other natural resources between states which have held allocation of a resource will not be made unless the party seeking the allocation proves by clear and convincing evidence some real and

substantial injury or damage. *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 103 S.Ct. 2817, 77 L.Ed.2d 387 (1982); *Colorado v. New Mexico*, 459 U.S. 176, 187-88, n. 13, 103 S.Ct. 539, 548, n. 13, 74 L.Ed.2d 348 (1979). The State did not respond to the argument that it need show a substantial or irreparable injury before the equitable relief of allocation may be granted. Instead, relying on the *LCO* decisions, the State asserts that it has established the need for an allocation because the demand for certain resources by non-Indian harvesters exceeds the available supply. The Landowners argue the equitable apportionment doctrine is inapplicable in this case, because the cases applying the doctrine involved Indian water rights adjacent to Indian reservations and that this case does not involve an Indian reservation.

In *Idaho ex. rel. Evans*, the State of Idaho sought "an equitable apportionment against the states of Washington and Oregon of the anadromous fish that migrate between the Pacific Ocean and spawning grounds in Idaho." 462 U.S. at 1018, 103 S.Ct. at 2819. The case was tried before a Special Master, who denied Idaho relief because Idaho had failed to demonstrate it suffered any injury by the states of Washington and Oregon and because it would be impossible to fashion a decree to apportion the fish fairly among the parties even if sufficient injury were shown. *Id.* at 1024, 103 S.Ct. at 2822-23. The Court determined that the natural resource of anadromous fish is sufficiently similar to water rights to allow for the application of the equitable apportionment doctrine to resolve allocative disputes. *Idaho ex rel. Evans*, at 1024, 103 S.Ct. at 2822-23.[7]

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[7] In *Arizona v. California*, 373 U.S. 546, 597, 83 S.Ct. 1468, 1496, 10 L.Ed.2d 542 (1962), the Court held that the equitable

> The anadromous fish at issue travel through several States during their lifetime. Much as in a water dispute, a State that over-fishes a run downstream deprives an upstream State of the fish it otherwise would receive. A dispute over the water flowing through the Columbia-Snake River system would be resolved by the equitable apportionment doctrine; we see no reason to accord different treatment to a controversy over a similar natural resource of that system.

Id. The Bands argue that the case before this Court similarly involves a dispute between sovereigns and their respective rights to the natural resources in the Minnesota Ceded Territory. Accordingly, the Bands argue that before this Court can make an allocation, the defendants must establish a substantial or irreparable injury or damage to its rights to the resources in light of the 1837 Treaty.

Although not explicitly provided therein, in those cases where an allocation of a resource was made between treaty harvesters and non-treaty harvesters, it is clear from the record of such case that a substantial or irreparable injury or damage had occurred to the right to harvest a resource.

In *Passenger Fishing Vessel, supra,* the Court held that an allocation of anadromous fish in the waters of the state of Washington was necessary to protect the Indians' treaty right to fish. The decision to allocate the fish

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apportionment doctrine should not apply to disputes to water rights between Indian Reservations and states because the Indians' claims are governed by the statutes and Executive Orders that created them.

resources was based, in part, on the fact that at the time the treaty was signed, neither the Indians or non-Indians contemplated that either party would interfere with the others' rights to fish, given the great abundance of the fish that existed at that time. *Id.* at 668, 99 S.Ct. at 3065-66. Accordingly, the parties did not intend to regulate the taking of fish by either party, nor was future regulation foreseen. *Id.* However, economic developments in canning and processing had resulted in the dominance of non-Indian fisheries and the eventual exclusion of the Indians from participating in fishing, "a trend that was encouraged by the onset of often discriminatory state regulation in the early decades of the 20th century." *Id.* at 668-669, 99 S.Ct. at 3066. Because the fish resources had become scarce, and because Indians were being excluded from participating in fishing due to means beyond their control, the Court held it critical to determine the meaning of the Indians treaty rights before making an allocation determination. *Id.* at 669, 99 S.Ct. at 3066.

Taking into consideration the historical context and the treaty language, the Court held the purpose and language of the treaty secured the Indians a right to take a share of each run of fish that passes through Indian tribal fishing areas. *Id.* at 679, 99 S.Ct. at 3071. Because the Indians had a right to a share of each run of fish that passed through their tribal fishing areas, the fact that they were being excluded from participating in fishing would clearly support a finding of a substantial and irreparable injury to their treaty rights.

The defendants argue the *LCO* decisions support its position that it need only show a heavy demand for a resource to warrant allocation. The *LCO* decisions in their

proper context, however, establish that allocation is proper only when substantial or irreparable damage occurs to the right to harvest resources in light of the treaty.

In determining when and if an allocation of a resource was necessary under the 1837 treaty, Judge Doyle relied heavily on *Passenger Fishing Vessel. See, LCO III,* 653 F.Supp. at 1433-34. In *LCO III,* the court refused to allocate a fixed share of any resource to the parties because such an allocation was unwarranted on the record currently before the court.

> Allocation has arisen in the Washington fishing rights cases in modern times in light of the scarcity of resources, such as steelhead and salmon, and because of the intense demand by Indians and non-Indians alike for those resources. In Washington, both Indians and non-Indians are involved extensively in commercial fishing. The modern fishing practices of non-Indians had the potential to harvest all of the steelhead and salmon before they ever reached the Indians' fishing grounds. In light of these circumstances, the court allocated between the Indians and non-Indians the harvestable share of the desired fish. The allocation was based on the specific language of the treaty between the Indians and the United States . . .

Neither the Chippewa nor the state of Wisconsin, I believe, suggests that a fixed share of any resource should be apportioned to the Chippewa, at least at this stage. Such an allocation is unwarranted at this time. Neither party has presented evidence that any particular species is

> endangered in the ceded territory. The Washington allocation cases differ from this case in significant respects: (1) no finding has been made here of scarcities of resources; (2) the language of the Chippewa treaty is different.

Id. 1434-35.

Despite repeated requests, the court in *LCO* refused to allocate the harvestable resources in the Ceded Territory because the record did not establish that Indian treaty harvesting was endangering a particular species. *LCO IV,* 668 F.Supp. 1233, 1240; *LCO V,* 686 F.Supp. 226, 233[8]; *LCO VI,* 707 F.Supp. 1034, 1058.

In *LCO VII, supra,* the court finally agreed to make an allocation, even though no showing had yet been made that any resource was in danger, finding the heavy competition for the most desirable of species met the necessary predicate for allocation.

> For example, the non-Indian hunting demand for anterless deer exceeds the available supply. In this sense, deer hunting is unlike non-Indian angling for walleye, which is essentially self-regulating, and it is like the salmon and trout fishing that was at issue in the Washington cases.

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[8] In her opinion following the moderate standard of living trial, Judge Crabb stated the 50/50 allocation made in *Passenger Fishing Vessel,* was proper where it had been shown that allocation was necessary both to protect the species and to protect the Indians' right to harvest the species. *LCO V,* 686 F.Supp. at 232.

> The showing of heavy competition establishes the predicate for addressing the issue of allocation. The full development of the record makes it possible to do so.

LCO VII, 740 F.Supp. at 1414. In addition to the existence of a heavy demand for certain resources, the court was also concerned that the Indians' harvesting capacity was not a workable long term solution, as their harvesting capacity was "bound to increase substantially as more of their members would utilize their newly reconfirmed harvesting opportunities." *Id.*, 1414-15. This concern more than likely stemmed from the fact that the Indians were asserting a right to harvest the resources to the extent needed to meet their moderate living needs. Thus, the Indian Bands argued they were entitled to a primary right to all harvestable resources, leaving to the non-Indians whatever was left over.[9] Based on the court's previous finding that all of the resources in the ceded territory were insufficient to provide the Bands a moderate standard of living[10], allowing the Indians to harvest as much of the resources as possible threatened the right to the non-Indians' equal share to the harvestable resources in the Ceded Territory. Thus, allocation was necessary to protect the rights of the non-Indians to the resources in the Ceded Territory. *Id.*, at 1416.

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[9] This position was consistent with a prior ruling by Judge Doyle in which he found that the Indians enjoy a greater right to hunt, fish and gather in the ceded territory than do non-Indians; the Indians rights are paramount. *LCO III*, 653 F.Supp. at 1435.

[10] *LCO V*, 686 F.Supp. at 231.

In this case, the Bands assert that both sides have a right to a fair share of the harvestable resources in the Minnesota Ceded Territory and that, subject to the foregone opportunity doctrine, the treaty harvest is subject to a 50% ceiling. Therefore, there is no possibility that the Bands' exercise of their usufructuary rights could possibly impinge upon the non-Indians fair share to the resources, given its Management Plan and Conservation Code which set the Bands' quotas well below 50%. Furthermore, the Bands point out that the court in *LCO VII* agreed to make an allocation only because "[t]he full development of the record makes it possible to do so." *Id.*, at 1414. In this case, the record has not been developed due to the fact that the Bands have not yet had the opportunity to exercise their usufructuary rights without the threat of illegal regulation by the State.

The State argues that a showing of heavy competition of a particular species, in and of itself, is sufficient to warrant allocation of that species, because any exercise of Band harvest will cause the State to restrict non-Band harvesters to avoid harvesting over the harvestable surplus. The Court is not persuaded such a showing is sufficient to warrant allocation. And given the divergent positions of the Bands in the *LCO* litigation and in this case, the Court is not convinced that the decision in *LCO VII*, supports the position the State now asserts.

The Court finds the position of the Bands persuasive and consistent with applicable case law. A treaty between the United States and an Indian tribe "is essentially a contract between two sovereign nations." *Passenger Fishing Vessel*, 443 U.S. at 675, 99 S.Ct. at 3069. It has already been decided that the Bands have continuing rights to

hunt, fish and gather under the 1837 Treaty. *Mille Lacs II*, 861 F.Supp. at 841. Before this Court should undertake the task of allocating resources between sovereign nations that each have rights in various natural resources, a showing of more than just a heavy demand to a particular species that may, or may not, result in less resources available for non-Indian harvest is required. Accordingly, before a party can receive the equitable relief of allocation, the party seeking an allocation must establish that their right to a fair share of a particular harvestable resource has been substantially or irreparably injured as a result of the other party's harvest of such resource. *See, Idaho ex rel. Evans*, 462 U.S. at 1027, 103 S.Ct. at 2824 (citations omitted). The determination of injury should be based on present conditions. *Id.*

The Bands argue, and this Court agrees, that as the defendants have requested that the Court allocate at least certain of the resources, it is the defendants' burden to establish that their right to a fair share of such resource has been substantially or irreparably damaged by the Bands' harvest of that resource. No such showing can be made at this time, however, because the Bands have had no opportunity to exercise their usufructuary rights under the 1837 Treaty. Accordingly, the record does not contain any evidence of current injury or damage, or even a likelihood of substantial injury or damage, to the rights of non-Indians to a fair share of the resources.

Although the time may come when an allocation of a resource will have to be made, the Court finds it would be inappropriate to do so at this time.

B. Moderate Standard of Living Doctrine.

In their motions for summary judgment, the Counties and Landowners assert that each of the Bands' treaty rights have been fully satisfied since each has achieved a moderate standard of living without relying on their usufructuary rights. Thus, the Bands are not entitled to any portion of the harvestable resources. Alternatively, the Counties argue the Court should conclude the Bands have failed to establish a need for increased harvest rights under the moderate standard of living doctrine and should thus prohibit the Bands from engaging in commercial harvest.

Although the State asserts genuine issues of material fact exist as to whether the Bands have achieved a moderate standard of living, the State's position on the moderate standard of living doctrine, and how it is to be applied in this case, is consistent with the positions asserted by the Counties and Landowners – that before the allocation of a resource should be quantified, the Court must first determine whether or not the Bands have achieved a moderate standard of living. In determining whether or not the Bands have achieved a moderate standard of living, the defendants argue that the Court must look to all sources of income, not just whether the Bands can achieve a moderate standard of living through the harvesting of resources in the Ceded Territory. The defendants assert that this procedure was followed by the court in the *LCO* litigation and in *United States v. Washington*, 873 F.Supp. 1422 (W.D.Wash.1994) and is consistent with the Supreme Court's holding and reasoning in *Passenger Fishing Vessel*.

The Bands assert that the moderate standard of living analysis proffered by the defendants is a serious misconception about the function of the moderate standard of living doctrine. The Bands first assert that the Supreme Court cases hold that the treaty rights reserved must be quantified in light of the purposes of the treaty. Thus, quantification of the Bands' treaty rights must take into account the purpose for which hunting, fishing and gathering were preserved. The Bands also assert that to take into consideration income from sources other than from hunting, fishing and gathering is inconsistent with the principles articulated in *Passenger Fishing Vessel*. The Bands argue that income from other sources is relevant only if it leads them to abandon their usufructuary rights, and there is no evidence that the Bands in this case have abandoned their rights. Finally, the Bands argue that reducing their treaty allocation on the basis of other income does not account for the right of the Bands to pursue hunting, fishing and gathering activities reserved by the treaty. Furthermore, the defendants' position on the moderate standard of living does not recognize the non-economic benefits that the Bands derive from hunting, fishing and gathering. The Bands assert that requiring them to address the moderate standard of living doctrine as a prerequisite for exercising their usufructuary rights is not supported by case law.

The starting point for both the Bands' and the defendants' argument as to allocation and the moderate standard of living doctrine is the opinion of the United States Supreme Court in *Passenger Fishing Vessel, supra*. Thus, that is where this Court begins its analysis.

In *Passenger Fishing Vessel*, the United States Supreme Court affirmed the findings of the district court that an equal amount of the anadromous fish runs should be assured to the Indians, to give proper meaning to the intent and purposes of the parties when the treaty was entered into. *Id.* at 685, 99 S.Ct. at 3074.

> It bears repeating, however, that the 50% figure imposes a maximum but not a minimum allocation. As in *Arizona v. California* and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say a moderate living.

Id. at 686, 99 S.Ct. at 3075. The defendants argue that this passage supports their view that the Bands are only entitled to that share of the resources that will bring them up to the level of a moderate standard of living, taking into consideration all sources of income. The State asserts that the Court did not qualify its statement that the Indians' livelihood must originate from fishing, even though it could have easily done so. The State further asserts the equal division was not litigated on the basis of moderate living needs, but rather on the basis of treaty interpretation. The Court finds these arguments without merit, for they ignore the context in which the above passage was made.

In *Passenger Fishing Vessel*, the Court was faced with the issue of whether and how to allocate a resource that

had once been inexhaustible. In making this determination, the Court held that it was necessary to determine the intent of the treaty signatories to determine the rights of the Indians to take the resource. *Id.* at 669, 99 S.Ct. at 3081-82. The treaty at issue provided "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . " *Id.* at 674, 99 S.Ct. at 3069. The Game Department had argued that this language only granted the Indians the right of access over private lands to their usual and accustomed fishing grounds, and an exemption from paying license fees. *Id.* at 671, 99 S.Ct. at 3067. The Court held that the treaty must be interpreted as the Indians would have understood it. *Id.* at 675, 99 S.Ct. at 3069. To make this determination it was necessary for the Court to review the historical context of the treaty and the language used. *Id.* at 676, 99 S.Ct. at 3069-70. The Court thereafter found the Indians would not have understood the treaty to guarantee them only an equal opportunity to fish. *Id.* The use of the words "right to take fish" together with "secured to said Indians" was interpreted as intending to secure or reserve to the Indians a share of each run of fish, rather than a personal right to attempt to take fish. *Id.* The Court went on to state that this interpretation of the treaty was not open to question as it had been a " 'matter decided' by our previous holdings." *Id.* at 679, 99 S.Ct. at 3071.

The first case interpreting the "Stevens Treaty",[11] and relied upon in *Passenger Fishing Vessel*, was *United States*

[11] Governor Stevens was the principal negotiator in the treaties discussed in the Washington fishing cases, including *Passenger Fishing Vessel*, and the treaties have been thus referred to as the Stevens Treaties.

v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). At issue in *Winans* was the ability of a non-Indian harvester, who had acquired title to property on the Columbia River and a license to use a fish wheel, to exclude the Yakima Indians from one of their "usual and accustomed" places for fishing. The *Winans* Court rejected the argument that the Indians could be excluded based on the argument that the Indians acquired no rights "but such as they would have without the treaty." *Winans*, at 380, 25 S.Ct. at 664. The Court found, rather, that the treaty reserved to the Indians rights beyond those which other citizens may enjoy.

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them, – a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. . . . There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved in common with citizens of the territory. As a mere right, it was not exclusive to the Indians. Citizens might share it, but the Indians were

> secured in its enjoyment by a special provision of means for its exercise. They were given the right of taking fish at all usual and accustomed places, . . . The contingency of future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land – the right of crossing it to the river, – the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty.

Winans, at 381, 25 S.Ct. at 664.

Not only did the Court in *Passenger Fishing Vessel* find the language of the *Winans* opinion significant, it found the actual disposition of the case more so. *Passenger Fishing Vessel* at 681, 99 S.Ct. at 3072. For the *Winans* Court not only upheld the Indians' right of access to the respondent's private property, but assured the Indians a share of the fish by ordering the Circuit Court to devise some adjustment and accommodation that would protect them from total exclusion. *Id.* (citing, *Winans*, 198 U.S. at 384, 25 S.Ct. at 665).

Other decisions that formed the basis of the Court's holding in *Passenger Fishing Vessel* were the *Puyallup*[12] trilogy of cases, which explicitly held "that neither party to the treaties may rely on the State's regulatory powers or on property law concepts to defeat the other's right to

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[12] *Puyallup Tribe v. Washington Dept. of Game*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968); *Washington Dept. of Game v. Puyallup Tribe*, 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973); *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977).

a 'fairly apportioned' share of each covered run of harvestable anadromous fish." *Id.* at 682, 99 S.Ct. at 3072. The Court also noted that similar interpretations have been followed with respect to hunting rights, *Antoine v. Washington*, 420 U.S. 194, 205-206, 95 S.Ct. 944, 951, 43 L.Ed.2d 129 (1975) and water rights that were merely implicitly secured to the Indians by treaties reserving land. *Arizona v. California*, 373 U.S. 546, 598, 83 S.Ct. 1468, 1496-97, 10 L.Ed.2d 542 (1963), (*following, United States v. Powers*, 305 U.S. 527, 528-533, 59 S.Ct. 344, 344-47, 83 L.Ed. 330 (1939); *Winters v. United States*, 207 U.S. 564, 576, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908)).

In *Winters v. United States, supra* the Court addressed the 1888 treaty in which the Gros Ventre, Piegan, Blood, Blackfeet and River Crow Indians ceded a large tract of land and retained a portion which became the Fort Belknap Reservation. The issue addressed by the Court was whether the Indians had a superior right to the waters of the Milk River for domestic and irrigation purposes. In finding that the Indians did have superior rights to such waters, the Court recognized that the reservation was part of a larger tract of land which the Indians had the right to occupy and use, and which was adequate to serve their needs. *Winters*, 207 U.S. at 576, 28 S.Ct. at 211. Although the treaty did not mention a reservation of water, the Court reasoned such a reservation would have been intended by the parties at the time the treaty was signed.

> The Indians had command of the lands and the waters – command of all their beneficial use, whether kept for hunting, and 'grazing roving herds of stock' or turned to agriculture and the

> arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?

Id. The Court did not determine the appropriate measure of the water reserved by the Indians, but its reasoning and holding were later followed in a decision where such measure was made. *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963).

In *Arizona v. California* the Court was requested to make an equitable apportionment of the waters of the Colorado River between the states of Arizona, California, Nevada, New Mexico and Utah. The United States submitted claims to these waters for use on Indian Reservations. The Court determined that not only did the Indians reserve the lands that made up the reservations, but enough of the water from the Colorado River to irrigate the irrigable portions of the reserved lands. *Arizona*, 373 U.S. at 600, 83 S.Ct. at 1497-98 (*following, Winters v. United States, supra*). In reaching its decision, the Court explicitly rejected the arguments of the state of Arizona that the proper measure of the Indians' water rights would be assessed by the Indians' reasonably foreseeable needs as determined by the number of Indians residing on the reservation. *Id.*, at 601, 83 S.Ct. at 1498. "How many Indians there will be and what their future needs will be can only be guessed. We have concluded . . . that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." *Id.*

From its review of the cases discussed above, the Court in *Passenger Fishing Vessel* held:

> The purport of our cases is clear. Nontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other 'citizens of the Territory.' Both sides have a right, secured by treaty, to take a fair share of the available fish.

Id. at 684-5, 99 S.Ct. at 3074.

Based on this principle of law the Court next determined that "an equitable measure of the common right should initially divide the harvestable portion of each run that passes through a 'usual and accustomed' place into approximately equal treaty and non-treaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount." *Id.* at 685, 99 S.Ct. at 3074. The Court acknowledged that its prior cases did not mandate this division, but that such practice is consistent with prior decisions. *Id.* The Court then went on to state:

> It bears repeating, however, that the 50% figure imposes a maximum but not a minimum allocation. As in *Arizona v. California* and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say a moderate living. Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will, upon

> proper submissions to the District Court, be modified in response to changing circumstances. If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish.

Id., at 686-687, 99 S.Ct. at 3075.

What *Passenger Fishing Vessel* and its predecessors establish is this: if an allocation of a resource must be made, such allocation should be quantified to fulfill the purposes of the treaty, while at the same time recognizing the rights of non-Indian harvesters to a resource. Thus, the threshold issue is not whether the Bands have achieved a moderate standard of living, but what was the purpose and intent of the treaty, and what amount of resources are needed to fulfill such purpose and intent. Where it is determined that the resource cannot meet the needs of both the non-Indians and the Bands, an allocation should be made.

In *Mille Lacs II*, Judge Murphy found that the Chippewa survived by hunting, fishing and gathering. 861 F.Supp. at 791. After thoroughly analyzing the treaty negotiations, Judge Murphy determined

> [t]he Chippewa understood that Article 5 allowed them to continue their hunting, fishing, and gathering way of life. The Chippewa also understood that Euro-Americans would begin to enter the ceded territory, but they did not

> believe that their arrival would interfere with their hunting, fishing, and gathering activities because of the size of the territory, the purpose of the treaty (access to pine timber) and the abundance of resources.

Id. at 797. Thus, the determination has been made that the 1837 treaty provides the Bands the *right* to continue a way of life based on hunting, fishing and gathering and that such right would not be limited. This finding is also consistent with those findings made in the *LCO* litigation.

> When they agreed to the treaties of 1837 and 1842, the Chippewa's understanding was as follows: They were guaranteed the right to make a moderate living off the land and from the waters in and abutting the ceded territory and throughout the territory by engaging in hunting, fishing and gathering as they had in the past and by consuming the fruits of that hunting, fishing and gathering or by trading the fruits of that activity for goods they could use and consume in realizing that moderate living.

LCO III, 653 F.Supp. at 1424.

The State argues that there is evidence that suggests that the Bands did not understand that their rights to hunt, fish and gather were unlimited. The State asserts that its expert, Dr. Paul Driben, has opined that the Chippewa understood that the privilege was a guarantee that they and their descendants would be able to earn a living by "pursuing natural resources in conformity with the fundamental principles of their culture." Feb. 7, 1996 Driben Rpt at 32. Dr. Driben also opines that the Chippewa "did not understand the privilege as one that would enable them and their descendants to become

engaged in full-scale commercial exploitation of the resources in the territory . . . " *Id.* The State asserts Dr. Driben's expert opinion establishes that the Bands did not understand that their right to hunt, fish and gather were unlimited. The Bands respond that it is not their position that they have exclusive rights to the resources in the Ceded Territory, rather they argue they have a non-exclusive right subject to the equal sharing principle of *Passenger Fishing Vessel*. The Bands also do not dispute that they had and continue to have a strong cultural tradition against over-harvest and over-exploitation of natural resources. Accordingly, this Court finds that the purpose of Article 5 was to guarantee the Bands the right to continue a way of life based on hunting, fishing and gathering, and that such right is limited by the right of non-Indian harvesters to a fair share.

The Court must reject the position of the defendants on the moderate standard of living doctrine because it would require the Court to completely ignore the purposes and intent of the 1837 Treaty, which guaranteed the Bands the right to continue their way of life through hunting, fishing and gathering. The defendants' position also renders the usufructuary rights recently reconfirmed by this Court as meaningless, and would punish the Bands for seeking a living through other means at a time when they were wrongly denied the right to exercise their usufructuary rights by the State.

As stated by the Court in *Winans*, the treaty reserved a right to the Bands that they had always possessed. In this case, it is the right to a way of life based on hunting, fishing and gathering. Because it is a reservation of a right, not a grant of a right, the Bands must be given the

opportunity to choose whether or not to continue with a way of life that is based on hunting, fishing and gathering. At this time, the Bands have not had the opportunity to make that choice, as the State has not allowed them to exercise their rights without the threat of state regulation. Until the Bands have had a reasonable opportunity to exercise their treaty rights, this Court will not address the moderate standard of living doctrine.

The Court believes this determination is entirely consistent with the language in *Passenger Fishing Vessel* regarding the change of circumstances that would warrant a reduction in the Indians' treaty share – if the tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries. *Id.* at 687, 99 S.Ct. at 3075. As noted above, the *Passenger Fishing Vessel* Court recognized that the Indian fisheries had declined due to illegal regulation and illegal exclusionary tactics. *Id.*, at 669, n. 14, 99 S.Ct. at 3066, n. 14. In recognizing this decline, the Court did not see fit to inquire as to whether or not the Indians found other sources of support as a result. Rather, the Court looked to the purpose of the treaty and determined such treaty provided the Indians a right to take fish to ensure them a moderate standard of living. Accordingly, the Court deemed the Indians were entitled to a fair share of the anadromous fish and that such share would be reduced if they chose to abandon their fishing rights. The use of the word "abandon" implies that such reduction could only be shown once the Indians were allowed to exercise their rights without illegal regulation or exclusion by non-Indians. Furthermore, in determining the intent of the parties to the treaty, the Court determined that "[t]he

impact of illegal regulation . . . and of illegal exclusionary tactics by non-Indians . . . in large measure accounts for the decline of the Indians fisheries during this century and renders that decline irrelevant to a determination of the fishing rights the Indians assumed they were securing by initialing the treaties in the middle of the last century." *Id.* at 669, n. 14, 99 S.Ct. at 3066, n. 14.

The defendants nonetheless argue that the moderate standard of living, as they have defined such term, has been applied by other courts. *See, LCO V,* 686 F.Supp. 226 (W.D.Wis.1988); *United States v. Washington,* 873 F.Supp. 1422 (W.D.Wash.1994). What distinguishes those cases from this case however, is the simple fact that the Indians had been exercising their treaty rights, without illegal state regulation, for years before the issue of allocation was addressed. That is not the case here.

Based on the above, the Court finds that as a matter of law, the Bands' share of the resources available under the 1837 Treaty cannot be reduced, before they have begun to exercise their treaty rights, because the Bands may have achieved a moderate standard of living from other sources. At the appropriate time, an allocation of resources will be made in a manner that will give full force and effect to the intent and purpose of the treaty. The allocation must also recognized the rights to non-Indian harvesters to their fair share in such resources. The Court will not address the allocation issue, however, until the proper showing has been made, as discussed in Section III, A, supra. The Bands are thus entitled to judgment on the allocation issues. The motion of the Counties and the Cross-motions of the Landowners are denied.

IV. Counties' Motion to modify or clarify protective order

This motion will be denied.

V. Landowners' motion to exclude declaration of Don Wedll and expert report of Harriet Kuhnlien

The Landowners have moved the Court to exclude the expert report of Harriet Kuhnlien, which addresses the question whether the use of traditional Chippewa foods can improve the health and well-being of Band members, as being irrelevant, immaterial, lacking foundation, based upon hearsay and not upon personal knowledge. The expert report of Harriet Kuhnlien is relevant only to the determination of whether or not the Bands have achieved a moderate standard of living. As the Court finds such a determination is not necessary at this point, the Court will deny the motion without prejudice.

The Landowners also seek to exclude the declaration of Don Wedll, which was filed by the Bands in support of their motion for a preliminary injunction. However, as the Court need not address the motion for a preliminary injunction, the motion to exclude the declaration of Don Wedll is moot. Therefore, the motion is denied with prejudice.

VI. Landowners' Motion to Strike Paragraph 4.12 of the Mille Lacs Band's Complaint

The Landowners move the Court to strike Paragraph 4.12 of Mille Lacs Band's Complaint which reads:

> as result of the enforcement of defendants' natural resource laws and regulations, and threats of arrest, seizure and confiscation, the Band and its members have been prevented from or deterred in the exercise of their rights to harvest fish, game and other resources for subsistence, ceremonial, and cultural uses, and commerce as secured by the 1837 Treaty. As a result the Band has been deprived of an important source of subsistence resources and personal income, at a time when per capita income among Band members residing in or near the reservation is about $2,100.00 per year, unemployment is approximately 50%, and most Band households are in poverty.

The Landowners argue that the evidence that has been collected since the filing of the Complaint clearly establishes that these allegations are no longer true, if they ever were, due to the success of the Mille Lacs Band's casinos.

Rule 12(f) of the Federal Rules of Civil Procedure provides:

> Upon motion made by a party before responding to a pleading, or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

The Landowners assert that while Rule 12(f) typically requires a motion to strike be made within twenty days after service of a pleading, the Court has broad discretion

to grant such motions regardless of time, citing to *Lunsford v. United States*, 570 F.2d 221 (8th Cir.1977).

While this Court has the discretion to grant a motion to strike at any time, such motions are nonetheless viewed with disfavor and are infrequently granted. *Lunsford*, 570 F.2d at 229. It should not be used to procure a dismissal of all or part of a Complaint. *Yamamoto v. Omiya*, 564 F.2d 1319, 1327 (9th Cir.1977); 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure:* § 1380, at 644 (1990). For purposes of deciding a Rule 12(f) motion, the Court must accept the facts alleged in Paragraph 4.12 of the Complaint as true. *Barnidge v. United States*, 101 F.2d 295 (1939). Accepting the facts as true, the Landowners cannot establish that Paragraph 4.12 contains assertions that are redundant, immaterial, impertinent or scandalous. Motion to strike is denied.

The Landowners have also filed a motion in limine to exclude portions of the expert report of Professor Daniel Bromley regarding Wisconsin property values. The expert report of Professor Bromley is relevant only to the allocation determination. As the Court finds such a determination is not necessary at this point, the Court will deny the motion without prejudice.

VII. Landowners' Motion to Impose Liabilities on Band

The Landowners also move for an order establishing 1) the Bands' liability on any and all claims arising from the Bands' and their members exercise of their usufructuary rights under the 1837 Treaty; 2) a compulsory insurance requirement for the Bands; and 3) a mandatory

waiver of Band sovereign immunity and submission to state court adjudication as to such claims.

The Bands assert that this Court is without jurisdiction to decide this motion as it does not address an actual case or controversy. As stated earlier in this opinion, declaratory relief is only appropriate where there is an actual controversy. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 463-64, 81 L.Ed. 617 (1937). An actual controversy involves definite and concrete facts, not a dispute involving hypothetical situations. *Id.* at 240-241, 57 S.Ct. at 463-64. The Landowners do not present a controversy involving concrete or definite facts. Rather, it is only based on hypotheticals. Accordingly, the Court does not have jurisdiction to decide this motion.

VIII. Landowners' Motions for Declaratory Judgment to Limit Exercise of Usufructuary Rights for Subsistence Purposes

The Landowners assert that if the Court rules the Bands do not have an adequate remedy at law, and that the Bands will be allowed to exercise their usufructuary rights under the 1837 Treaty, the Bands should be limited to exercising such rights for their subsistence purposes only. *See*, Landowners Second and Third Motions for Summary Judgment. In *Mille Lacs II*, Judge Murphy has ruled "that the privilege granted in 1837 includes the right to harvest the resources for commercial purposes. Limits to this right because of resource allocation issues is a question for Phase II." 861 F.Supp. at 838. Thus, while the Landowners concede that the Bands treaty rights

include commercial harvests, the Landowners nonetheless assert that the Bands' right to harvest the resources must be limited as they have achieved a moderate standard of living. Because the Court has ruled allocation will not be addressed at this stage of the litigation, the Court will not address the issues raised in these motions.

CONCLUSION

The Bands are entitled to summary judgment on all regulatory issues presented before the Court, with the exception of the definition of private lands. Accordingly, the Court finds that the legal standards that govern the State's regulations of treaty hunting, fishing and gathering place the burden on the State to establish its regulations are necessary for conservation, public health and safety, and that such regulations meet appropriate standards and do not discriminate. The burden does not shift to the Bands when the regulations involve a harvestable surplus determination. The Bands' treaty rights extend to all waters in and abutting the Ceded Territory. The exercise of usufructuary rights on private lands are limited to those private lands open to the public for hunting, fishing or gathering by operation of state law, such as the Minnesota tree growth tax law which creates a right of public access in exchange for granting of favorable tax treatment to lands. With respect to deer shining in December and gillnetting in lakes under 1,000 acres, the Court finds that the State has failed to meet its burden of establishing that the regulation of such harvest methods is necessary for purposes of conservation in light of the Bands' Conservation Code and Management Plans which place restrictions on these harvest methods. Finally, the Court will not

make any allocation determination of resources at this time because there has been no showing of a need for allocation. Furthermore, the Court finds that it is inconsistent with applicable case law to prevent the Bands from exercising their rights, based on the argument that casino revenue provides the Bands with sufficient income. The treaty of 1837 reserved to the Bands the right to continue a way of life based on hunting, fishing and gathering. Because the 1837 Treaty preserves a way of life, not simply a means to make a living, the moderate standard of living doctrine cannot be applied to reduce the Bands' share of the resources even before they are given a chance to harvest the resources.

IT IS HEREBY ORDERED:

1. The Stipulations are hereby approved, and the Court hereby makes the following FINDINGS and enters the following ORDERS consistent with the STIPULATIONS:

a. Upon adoption of the Band Code, including authorization of State of Minnesota Department of Natural Resources personnel to enforce the provisions of such Code, issuance of the Commissioner's Orders and approval of the Management Plans and Protocols attached as Exhibits A, B, C and D to the Stipulations, by one or more of the plaintiff or plaintiff-intervenor Bands, and enforcement of the same, the application to such Bands and their members of the State statutes and regulations listed in Exhibit E to the Stipulations as "Resolved", to the extent set forth in Exhibit E, will not be necessary for conservation, public health or safety as those terms

were used by the Court in its Phase I decisions, and will therefore be unlawful.

b. The requirements of this order shall become effective immediately upon entry of the Court's final order in this case, and shall be binding on all parties, their successors in office, their agents, officers and representatives, and any and all persons claiming an interest through them.

c. If any Band fails to adopt a conforming conservation code, attempts to rescind or otherwise nullify its entire code, or substantially fails to enforce the provisions of its code, the members of that Band harvesting within the Minnesota 1837 Ceded Territory shall be subject to those state laws and regulations that meet the standards set forth in the Court's Phase I decision. The State may make objections to any changes in individual code provisions proposed by one or more of the Bands in the future in accordance with the procedures in the Protocols in Exhibit D to the Stipulation.

d. The State and the Bands shall fairly, uniformly and diligently enforce the conforming Band conservation codes adopted pursuant to this Court's final order, and their respective enforcement officers shall work cooperatively in doing so. In their respective enforcement activities, the Minnesota Department of Natural Resources shall make good faith efforts to coordinate with Band conservation wardens and Great Lakes Indian Fish and Wildlife Commission wardens duly appointed by a Band, and the Bands shall make good faith efforts to coordinate with State Department of Natural Resources Conservation Officers. The Bands and Great Lakes Indian Fish and

Wildlife Commission Enforcement and Biological staffs shall share harvest, registration and similar data with the Minnesota Department of Natural Resources enforcement and biological personnel in a timely and professional manner in accordance with Protocol No. 4.

e. All records of tribal courts involving the exercise of treaty harvest rights shall be open for inspection and copying by the State Department of Natural Resources at reasonable times upon reasonable notice. The actual proceedings in said courts shall also be open to the State Department of Natural Resources. Any such records or proceedings that are protected by tribal law as confidential, such as juvenile records and proceedings, shall also be kept confidential by the State.

f. The Stipulating Parties shall comply with the terms and provisions of the Protocols set forth in Exhibit D to the Stipulations, including, without limitation, the procedures for resolving future disputes among those parties regarding the application of particular State statutes and regulations to Band members.

g. The Court will retain continuing jurisdiction over these cases to facilitate the implementation of the Court's orders and decrees herein, to resolve any disputes among the parties with respect thereto, or to address other matters as the Court may deem appropriate.

2. The Court grants summary judgment as follows:

a. MS 97A.045 is not reasonable and necessary for conservation as those terms are used in the Court's Phase

I decisions and therefore cannot be applied to Band members exercising their treaty rights pursuant to Band regulation, as provided in the Stipulations and their attachments. The State and the Bands shall attempt to reach consensus on harvestable surplus determinations in accordance with the Protocols attached to the Stipulations, but may seek resolution of disputes regarding such determinations from the Court on the terms and conditions set forth in the Protocols.

b. The Bands may exercise their treaty rights throughout the 1837 Ceded Territory in Minnesota, including the entirety of those lakes that are at least partially within the Ceded Territory. Harvestable surplus determinations shall not be reduced on the basis of the portion of a lake that is outside the Ceded Territory or the portion of a wildlife population that may be found on private lands absent a showing that such a reduction is necessary under the conservation necessity standard.

c. MS 97B.081, MS 97B.311, MR 6232.0300 and MR 6232.1300 are not reasonable and necessary for conservation as those terms are used in the Court's Phase I decisions and therefore cannot be applied to Band members exercising their treaty rights pursuant to Band regulation, as provided in the Stipulations and their attachments.

d. MS 97C.325, MS 97C.331 and MR 6262.0200 are not reasonable and necessary for conservation as those terms are used in the Court's Phase I decisions and therefore cannot be applied to Band members exercising their treaty rights pursuant to Band regulation, as provided in the Stipulation and its attachments.

3. The defendant and defendant-intervenors are entitled to summary judgment in their favor that the definition of "private lands" open to public hunting, fishing and gathering, excludes private lands not open to the general public without discrimination, by operation of state law. The defendant and defendant-intervenors are entitled to summary judgment in their favor on the issue of the inability of a landowner's consent to make otherwise private lands "private lands open to public hunting, fishing and gathering" for purposes of exercising treaty rights. The remaining motions for summary judgment by the defendant and defendant-intervenors on regulatory issues are DENIED in their entirety. The Bands' motion for summary judgment on the definition of private lands is DENIED.

4. The Court finds that all claims and defenses regarding the 1837 Treaty in these actions have been adjudicated. There are no other claims and defenses in *Mille Lacs Band v. State*, No. 3-94-1226, ___ F.Supp. ___ (D.Minn.1997) and the Clerk is directed to enter final judgment in that action in accordance with the opinions and orders of the Court. Although there are other claims (regarding the 1854 Treaty) in *Fond du Lac Band v. Carlson*, No. 5-92-159, the Court finds pursuant to Fed.R.Civ.P. 54(b) that there is no just reason for delay in entering judgment in that action on the claims and defenses arising under the 1837 Treaty, and the Clerk is directed to enter judgment on those claims and defenses in accordance with the opinions and orders of the Court. The State defendants in both actions, their officers, agents, servants, employees and attorneys, and anyone acting in concert with them, are permanently enjoined from any

actions or inactions that would prevent or interfere with the exercise of the Bands' rights to hunt, fish and gather under the 1837 Treaty except as authorized in the opinions and orders of the court.

5. The Court GRANTS the plaintiffs' and plaintiff-intervenors' motion for summary judgment on allocation issues and DENIES the defendant and defendant-intervenors' request for an allocation of resources. Such denial is without prejudice to any party's right to bring new proceedings if it should appear that either treaty or non-treaty harvesters will be deprived in the future of a meaningful opportunity to harvest any resource.

6. The Counties' motion to modify or clarify the protective order of April 25, 1995 is DENIED.

7. The Landowners' motion to exclude the declaration of Don Wedll is DENIED.

8. The Landowners' motion to exclude the expert report of Harriet Kuhnlien is DENIED WITHOUT PREJUDICE.

9. The Landowners' motion to strike paragraph 4.12 of the Complaint is DENIED.

10. The Landowners' motion to exclude portions of the expert report of Daniel Bromley is DENIED WITHOUT PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.